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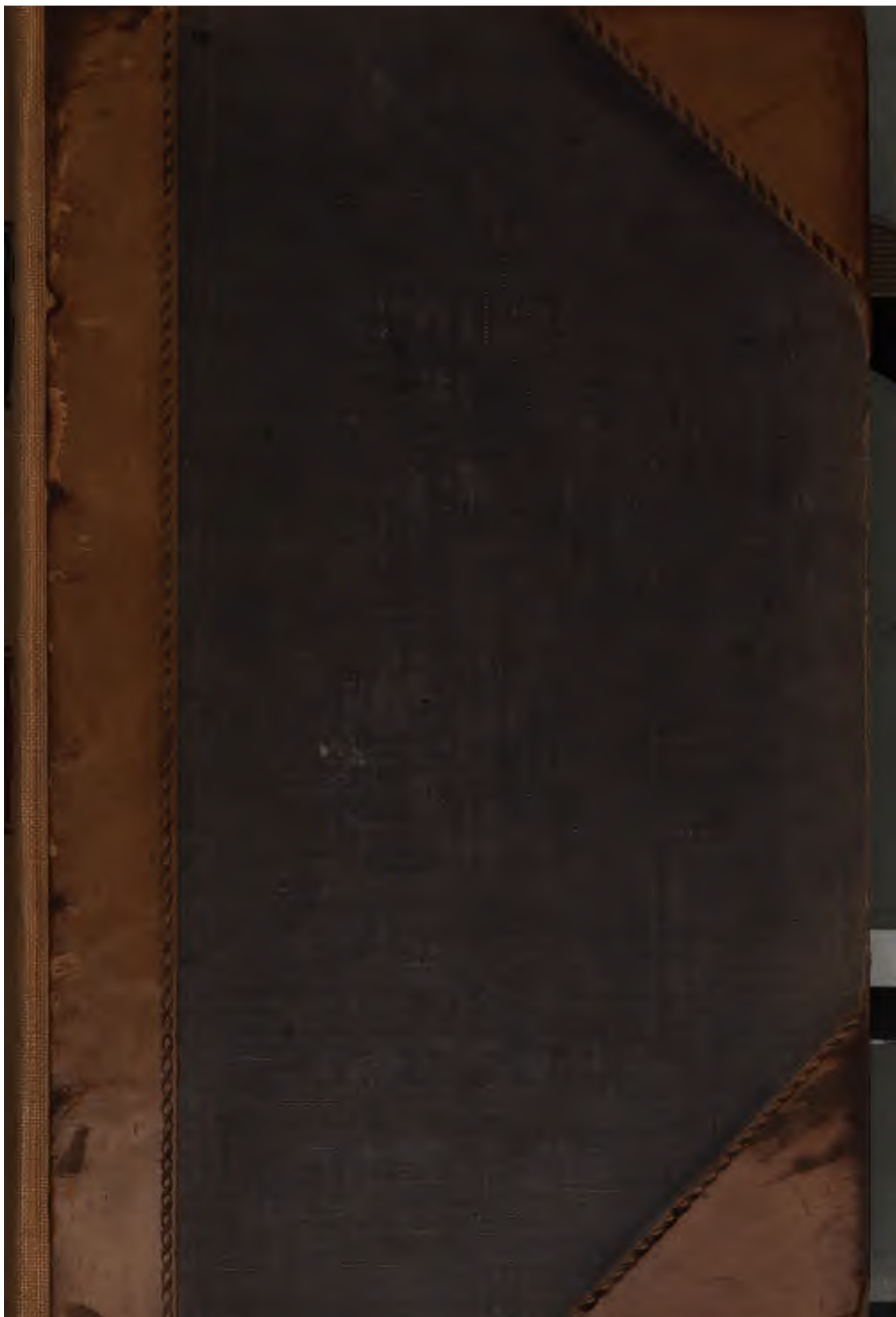
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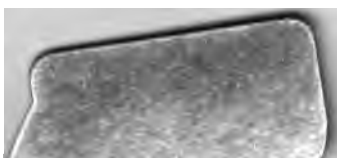


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REPORTS OF CASES
DECIDED IN THE
COURT OF PROBATE AND THE COURT FOR DIVORCE
AND
MATRIMONIAL CAUSES.

REPORTS OF CASES
DECIDED IN THE
COURT OF PROBATE
AND IN
THE COURT FOR
Divorce and Matrimonial Causes.

WITH TABLES OF THE NAMES OF CASES, AND
INDEXES TO THE PRINCIPAL MATTERS.

BY
M. C. MERTTINS SWABEY, D.C.L.,
ADVOCATE IN DOCTORS' COMMONS, AND OF GRAY'S INN, BARRISTER-AT-LAW,
AND
THOMAS HUTCHINSON TRISTRAM, D.C.L.,
ADVOCATE IN DOCTORS' COMMONS, AND OF THE INNER TEMPLE.

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TABLE OF CASES REPORTED.

IN THE COURT OF PROBATE.

	Page
ALMOSNINO, ANN, in the Goods of. Executed and unexecuted Testamentary Papers.—Parol Evidence	508
AXFORD, CHARLES, in the Goods of. Blind Testator.—Proof of Knowledge of Contents of Will. Limited Grant to Executor of Party beneficially interested	540
BAYNE, RACHEL, Spinster, in the Goods of. Chain of Executorship.—Will of <i>Feme covert</i>	132
BELBIN v. SKEATS. Proof of Execution of Will.—Examination of one Attesting Witness sufficient	148
BEDWELL, FREDERICK, in the Goods of. Transference of Jurisdiction.—Affidavit.—Practice	15
BELL, JANE, in the Goods of. Administration.—Wife's Next of Kin.—Renunciation of Husband's personal Representative	288
BIANCHI, LUIS, in the Goods of. Administration of the Effects of a domiciled Brazilian to an Attorney for that purpose duly appointed	511
BISHOP, HENRY, in the Goods of. Administration.—Presumption of Death at Sea.—Lapse of time insufficient	303
BRAINE v. BRAINE AND BRAINE. Taxation of Costs.—20 & 21 Vict. c. 77, s. 29.—Number of Counsel allowed.—Discretion of Registrar.—Costs of Application	271
BROWN, WILLIAM, in the Goods of. Prior and second Will.—Revocation.—Parol Evidence	32
BURRELL, MARY, in the Goods of. Administration.—20 & 21 Vict. c. 77, s. 73	64

	Page
CADYWOLD, THOMAS, in the Goods of.	
Will.—Marriage and Birth of Child.—Revocation	34
CARELESS <i>v.</i> THOMPSON.	
Pauper condemned in Costs	21
CARR, JAMES, in the Goods of.	
Revocation.—Lost Letters of Administration.—Undertaking	111
CHARLTON <i>v.</i> HINDMARSH.	
Attestation and Subscription of Witnesses to Will.—1 Vict.	
c. 26, s. 9	433
Administration <i>pendente lite</i> .—Security.—Passing Accounts.	
—Payment of Debts	519
CHATELAIN <i>v.</i> PONTIGNY.	
Married Woman's Will.—Alleged Power.— <i>Barnes v. Vin-</i>	
<i>cent</i> , 5 Moore, P.C.	411
CLARKE, SUSANNAH, in the Goods of.	
Will.—Execution by Mark.—Wrong Name	22
COOKE, HARRIET, in the Goods of.	
Administration.—Practice under 20 & 21 Vict. c. 77, s. 73 .	267
COOPER, ROBERT, in the Goods of.	
Executor abroad.—Administration with Will annexed to Re-	
siduary Legatee	66
COOPER AND SPARKS <i>v.</i> MOSS AND MOSS.	
20 & 21 Vict. c. 77, s. 38.—Place of Trial	143
CRISPIN <i>v.</i> DOGLIONI.	
Security for Costs.—Plaintiff Foreigner.— <i>Tambisco v. Pa-</i>	
<i>cifico</i> , 7 Ex. Rep. 816.	522
CRAUSE, JANE ELIZABETH, in the Goods of.	
Administration.—Husband and Wife deceased.—Husband	
next of kin	146
CROOKENDEN <i>v.</i> FULLER.	
Will.—Residence abroad.—Domicil of Origin.—Evidence.	
—Domicil for the purpose of Succession.—Burden of	
Proof	441
DARKE, ELIZABETH, in the Goods of.	
Corporation aggregate.—Executors.—Appointment of Syn-	
dic.—Practice	516
DAVY, ROBERT, in the Goods of.	
Codicil.—Clerical Error by Attorney who prepared Codicil	262
DE CHATELAIN <i>v.</i> PONTIGNY.	
Administration <i>pendente lite</i> to Defendant	34

TABLE OF CASES.

vii

	Page
DODGSON, CHRISTOPHER, in the Goods of. Administration limited to carry on a Suit in Chancery, and to receive a Fund the subject-matter of the Suit . . .	259
D'ORLEANS, H.R.H., THE DUCHESS, in the Goods of. Administration with Will annexed.—Foreign Grant to Minor.—Practice	253
DUNN v. DUNN. Absolute discretion of Judge of Court of Probate to send a Cause to a County Court having jurisdiction therein . .	521
EDWARDS, LOUISA, in the Goods of. Executors of Will.—Attesting Witness dead.—Probate with consent of Next of Kin	10
EDWARDS v. PAYNE AND REEVE. Will.—Verdict and Costs for Defendants.—Taxation thereof. —Practice	276
ELMS v. ELMS. Will.—Revocation.—Intention.—Act to carry into effect .	155
ELWELL, JOHN, in the Goods of. Diocesan Grant.— <i>Bona notabilia</i> without the Diocese.—20 & 21 Vict. c. 77. ss. 86, 87, 88	27
ENOCHIN AND OTHERS v. WYLIE. Will.—Domicil.—Probate.—Court of Construction . . .	118
EWART, LIEUTENANT COLONEL, in the Goods of. Administration.—Death of Husband and Wife.—Uncer- tainty as to Survivorship.—Form of Oath	258
FARLAR v. FARLAR. Next of Kin.—Executor.—Plea.—Costs.—Practice . . .	124
FITZROY, SIR CHARLES, AUGUSTUS, KNIGHT, in the Goods of. Execution of Power of Appointment by Will.—Subsequent Marriage.—Revocation.—7 Wm. IV. and 1 Vict. c. 28, s. 18	133
FRECKLETON, GEORGE, in the Goods of. Practice.—Probate Duty.—20 & 21 Vict. c. 77, s. 87 . . .	16
FRITH, WILLIAM, in the Goods of. Will.—Subscription of Attesting Witness	8
FYSON AND OTHERS v. WESTROPE AND CUTTING. Will.—Heir-at-Law cited.—Plaintiffs and Defendants.— Costs.—20 & 21 Vict. c. 77, ss. 29, 61, 64, 85	279
GARDNER, HERBERT CALTHORPE, Esq., in the Goods of. Will.—Probate of, as contained in Affidavit	109

	Page
GENT, MATTHEW, in the Goods of. Administration Bond.—Amount.—Sureties.—20 & 21 Vict. c. 77, ss. 81, 82	54
GOLDSBOROUGH, CHARLES, AND OTHERS, in the Goods of. Administration Bond.—Power of Attorney.—Alteration of Condition of Bond and of Affidavit	295
GOODYEAR, LOUISA, in the Goods of. A general Bequest followed by specific Bequests.—Universal Legatees in Trust	127
GREVES, EDWARD, in the Goods of. Will.—Incorporation	250
GULLAN, THOMAS, in the Goods of. Will.—Presumed Revocation	23
HADDON v. FLADGATE. Will of Married Woman.—Separation by Consent.—Sepa- rate Property	48
HAMEE v. BOREHAM. Pauper.—Counsel Assigned.—Practice	26
HARRIS v. BERRALL. Will.—Revocation.—Insanity.— <i>Onus Probandi</i>	153
HARRIS, HENRY, in the Goods of. Appointment of Executor.—Unexecuted Obliteration and Substitution.—No Revocation	536
HARVEY v. ALLEN. Probate in Solemn Form.—Compromise.—Jurisdiction of Court of Probate	151
HAYNES v. MATTHEWS. Married Woman's sole next of Kin.—Creditor.—Husband's Right to Administration	460
HOLGATE, JOHN, in the Goods of. Will.—Imperfect Recollection of attesting Witness.—Pre- sumption of due Execution	261
HOLL, MARY ANN, in the Goods of. Application for Delivery of Will out of Registry.—Practice	136
HOW, ELIZABETH, in the Goods of. Will.—Married Woman.—Presumption of Husband's Death	53
IREDALE v. FORD AND BEAMWORTH. Administration.—Bankrupt.—Majority of Interests	305
JAMES, ELIZABETH STONE, in the Goods of. Erasures.—Substitutions.—Probate in Blank	238

TABLE OF CASES.

ix

	Page
JONES, JOHN , in the Goods of.	
Administration.—Next of Kin out of Kingdom.—20 & 21	
Vict. c. 77, s. 73	13
JOHNSON, HENRIETTA , in the Goods of.	
Substituted Executor on death of an original Executor . .	17
KEENE, FRANCIS , in the Goods of.	
Limited Administration.—Probate.—20 & 21 Vict. c. 77,	
s. 73.—Deeds.—Practice	265
LANCASTER, ELEANOR , in the Goods of.	
Probate.—General or Limited Grant	464
LATHAM AND DEE v. WOOLBERT.	
Will.—Constraint.—Influence.—Capacity	1
LEESON, JOSEPH , in the Goods of.	
Administration.—Attorney of Next of Kin.—Surety.—	
Practice	463
LEWIS, SAMUEL WILLIAM , in the Goods of.	
Administration with Will annexed.—Residuary Clause.—	
Construction.—Things	31
LUDLOW, SOPHIA HENDERSON , in the Goods of.	
Administration with Will annexed.—Residuary Clause.—	
Construction.—Things	29
MACLEAN AND MACLEAN v. DAWSON AND OTHERS.	
Administration limited to substantiate proceedings in Chan-	
cery.—15 & 16 Vict. c. 86, s. 44	425
MAIN, ANDREW , in the Goods of.	
Administration.—Presumption of Death at Sea.—Payment	
of Policy by Underwriters	11
MANFREDI, BIAZIO , in the Goods of.	
Will in Registry of Court.—Practice as to parting with it .	135
MARSDEN, PETEE , in the Goods of.	
Paper not Testamentary on face of it.—Evidence of Testa-	
mentary Intention	542
MARSH AND OTHERS v. MARSH AND OTHERS.	
Will.—Codicils.—Presumption as to what papers form part	
of a duly executed Will.—General Revocatory Clause of	
all former Wills.—Effect of Annexation of Codicil to	
former Wills revoked.—1 Vict. c. 26, s. 22.—Costs.—	
Omission from Probate of opprobrious terms	528
MARTINDALE, JOHN JOSEPH , in the Goods of.	
Will with power of Appointment to Married Woman.—	
Renunciation of the Executor and Universal Legatee in	

	Page
Trust.—Administration (with Will annexed) to her Nominees appointed by Deed	8
MERRITT, ELIZABETH, in the Goods of.	
Execution of a power by Will.—General Revocatory Clause in a later Will.—7 Wm. IV. and 1 Vict. c. 26, s. 27 . . .	112
METTE v. METTE.	
Naturalized British Subject.—Marriage abroad with deceased Wife's Sister.—No revocation of previous Will	416
MUIR, JAMES, in the Goods of.	
Probate.—English Domicil.—Personalty in Scotland.—Sect. 14 of Confirmation and Probate Act, 1858	294
NICHOLS AND FREEMAN v. BINNS.	
Citing Heir-at-Law.—Infant Co-Heir.—61 and following Sections of 21 & 21 Vict. c. 77	19
Will.—Habitual Insanity.—Evidence of Lucid Interval.—Tests of Sanity.—Next of Kin.—Costs	239
NORRIS, WILLIAM THOMAS, in the Goods of.	
Administration.—Presumption of death at Sea.—Advertisement in Newspapers dispensed with	6
O'DWYER v. GEARE AND ANOTHER.	
Appointment by Married Woman under a Power.—Nomination of Executors.—21 & 22 Vict. c. 95, s. 16	465
OLIPHANT, HENRY, in the Goods of.	
Universal Legatee.—Administration or Probate.—20 & 21 Vict. c. 77, s. 39	525
PALMER v. MACLEAN AND M'GRATH.	
Proof of Will in Solemn Form.—Several Defendants.—Counsel.—Evidence.—Practice	149
PARKER, JANE, in the Goods of.	
Will.—Death of Devisee before Testator.—Child or other Issue.—1 Vict. c. 26, s. 33	523
PATTEN v. POULTON AND OTHERS.	
Will not forthcoming at Testatrix's death.—Presumption of Revocation rebutted	55
PEACH, MARTHA, in the Goods of.	
Execution.—Testamentary Paper.—Dispositive Words following Testator's Signature	138
PECK, ELISHA, in the Goods of.	
Creditor.—Appointment of Guardian.—Insolvent Estate.—Administration	141
PEGG v. CHAMBERLAIN AND OTHERS.	
Administration.—Practice.—Limited Grants to <i>Cestuis que Trust</i> .—Consent	527

TABLE OF CASES.

xi

	Page
PERRY v. F. H. DYKE, Esq. (QUEEN'S PROCTOR).	
Will.—Testamentary Incapacity.—Administration . . .	12
PRESANT AND PRESANT v. GOODWIN.	
Will.—Residuary Clause.—Failure of Mode of Application	
Intended.—Construction.—Costs	544
RAINE, JOSEPH, in the Goods of.	
Joint Will.—Application for Probate	144
RICHARDSON, SAMUEL, in the Goods of.	
Remuneration of Executors and Residuary Legatees in Trust.	
—Administration <i>de bonis non</i>	515
RIPLEY, JOHN PETER, in the Goods of.	
Will.—Copy.—Evidence of Execution	68
ROBERTS, SARAH HANNAH, in the Goods of.	
Administration.—20 & 21 Vict. c. 77, s. 73	64
ROBINS AND PAXTON v. DOLPHIN.	
Revocation of Will.—English Marriage.—Scotch Divorce.—	
<i>Bonâ-fide</i> Domicil	37
Practice.—Costs out of Estate	518
SCOTT v. SCOTT.	
Undue Execution of later Will.—Destruction of former	
Will.—Revocation not sustained	258
SHAW AND DICKENS v. MARSHALL AND OTHERS.	
Legatee.—Interveners.—Costs.—Practice	129
SHAW, MARY, in the Goods of.	
Will.—Codicils.—Presumptive Revocation	62
SMITH, REBECCA, in the Goods of.	
Married Woman. — <i>Separate Estate</i> .—Husband Wife's	
Trustee.— <i>Jus Disponendi</i>	125
SOUTHALL AND HUXLEY v. JONES.	
Power of Appointment under Settlement.— <i>De facto</i> Mar-	
riage with deceased Wife's Sister.—Will	298
SWINFEN v. SWINFEN.	
Will.—Next of Kin.—Executrix.—Costs	283
SYMES v. GREEN.	
Will.—Insane Delusion	401
TERRIBLE, JAMES, in the Goods of.	
Revocation of Will by Marriage.—Memorandum.—Revival	
by Codicil	140
THOMAS, JANE, in the Goods of.	
Will.—No Attestation Clause.—Presumption of due Execu-	
tion	255

	Page
TODD AND PRICE <i>v.</i> SUMPSION AND SPRIGGES.	
Will.—Pleading.—Amendment at Trial.—Costs.—Practice.	269
WAINWRIGHT, FREDERICK, in the Goods of.	
Administration.—Death of Husband and Wife.—Uncertainty as to Survivorship.—Form of Oath	257
WARE AND GROVE <i>v.</i> CLAXTON AND CLAXTON.	
Pleading.—Practice.—Leave to amend.—Conditions	251
WARREN (by his Guardian) <i>v.</i> KELSON.	
Administration with Will annexed.—Grant <i>de bonis non</i> .— Residuary Legatee.—Next of Kin	290
WATSON, JENNY, in the Goods of.	
Administration with Will annexed.—Specific Legatee	110
WATTS, WILLIAM, in the Goods of.	
Administration <i>de bonis non</i> with Will annexed.—Substi- tuted Legatee.—Limited Grant refused	538
WEIR, HARRIET S. L., in the Goods of.	
Administration. — Further Duty payable. — Sureties. — Amount of Bond.—55 Geo. III. c. 84, ss. 41, 42; 20 & 21 Vict. c. 70, ss. 81, 82	506
WILLMOTT, JOHN PERCIVAL, in the Goods of.	
WILL.—Memorandum.—Codicil	36
WORMAN, MARIA, in the Goods of.	
Desertion by Husband.—Protection Order.—Administration to Wife's Next of Kin of Property acquired after Deser- tion	513
YOUNG <i>v.</i> OXLEY.	
Intestacy.—Administration Bond to Bishop of Chester.— <i>Quære</i> whether Obligation survives to Judge of Court of Probate	25

IN THE COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

ALDRIDGE, <i>Ex parte</i> .	
Protection for Wife's Earnings.—Desertion	88
ARMITAGE, <i>Ex parte</i> .	
Divorce.—Practice.—Crim. Con. Action.—Co-Respondent	71
ANTHONY <i>v.</i> ANTHONY.	
Judicial Separation.—Cruelty.—Jealousy	594

TABLE OF CASES.

xiii

	Page
BADCOCK v. BADCOCK AND CHAMBERLAIN.	
Petition for Dissolution of Marriage.—Co-Respondent con-	
demned in Costs	189
BOSTOCK v. BOSTOCK.	
Judicial Separation.—Cruelty.—Condonation.—Threats . .	221
BOYNTON v. BOYNTON.	
Petition for Dissolution at Suit of Wife.—Interim Custody	
of Child.—20 & 21 Vict. c. 85, s. 35	324
BROOKES v. BROOKES.	
Petition for Separation.—Desertion by Husband.—Offer to	
return before 20 & 21 Vict. c. 85, came into operation . .	326
BELL v. BELL AND ANGLESEY.	
Petition for Dissolution.—Damages.—Marriage Settle-	
ments.—20 & 21 Vict. c. 85, s. 33.—22 & 23 Vict. c. 61, s. 5 .	565
BOYD v. BOYD AND COLLINS.	
Co-Respondent.—Costs.—Order on Respondent to deliver	
up Child	562
CURTIS v. CURTIS.	
Petition for Judicial Separation.—Custody of Children under	
sect. 35 of Divorce Act.—Interim Order	75
CARGILL v. CARGILL.	
Judicial Separation.—Desertion for Two Years.—Offer to	
return.—50 & 21 Vict. c. 85, s. 16	235
CHERRY v. CHERRY.	
Petition for Restitution of Conjugal Rights.—Plea of Cruelty.	
—Practice.—Right to begin	319
CUDLIFF v. CUDLIFF.	
Petition for Judicial Separation.—Desertion	229
CURTIS v. CURTIS.	
Judicial Separation.—Cruelty.—Condonation.—Acts of Vio-	
lence.—Threats.—Custody of Children.	192
CUNNINGTON v. CUNNINGTON AND NOBLE.	
Petition for Dissolution by Husband.—Neglect or Miscon-	
duct conducing to Adultery.—20 & 21 Vict. c. 85, s. 31 . .	475
DEANE v. DEANE.	
Judicial Separation.—Practice under 20 & 21 Vict. c. 85 . .	90
DU TERREBAUX v. DU TERREBAUX.	
Dissolution.—Clandestine Marriage.—Reasonable Excuse	
for Separation.—20 & 21 Vict. c. 85, s. 31	555
EVANS v. EVANS, on Motion.	
Petition for Dissolution of Marriage.—Practice.—Style of	
the Court.—Answer to Petition	78

	Page
EVANS v. EVANS AND ROBINSON.	
Previous Suit in Ecclesiastical Court dismissed.—Jurisdiction of Divorce Court	173
Petition for Dissolution.—Application under 40th Sect. of the Divorce Act to direct issue to be tried at the Assizes.—Jurisdiction.—Discretion of the Court	216
EVANS v. EVANS AND ROBINSON.	
Decree for Dissolution.—Co-Respondent.—Costs.—Practice.—20 & 21 Vict. c. 85, s. 34	328
FOSTER v. FOSTER AND EVANS.	
Affidavit in Verification of Petition.—Sect. 41 of Divorce Act, and 2nd & 3rd Rules.—Practice	167
H. (falsely called C.) v. C.	
Petition for Nullity of Marriage by reason of the Husband's alleged Impotence, Lapse of Time, and other Circumstances.—Practice	605
HASWELL v. HASWELL AND SANDERSON.	
Petition for Dissolution.—Separation before Adultery charged.—20 & 21 Vict. c. 85, s. 31	502
HAYWARD v. HAYWARD, on the Admission of the Plaintiff's Responsive Allegation.	
Suit for restitution of Conjugal Rights.—Insanity of Wife	81
HAYWARD v. HAYWARD, on Allotment of Alimony <i>pendente lite</i>.—Husband and Wife.—Alimony <i>pendente lite</i>	
	85
HAYWARD v. HAYWARD.	
Suit for Restitution.—Compromise by Counsel.—Practice	333
HOOKE v. HOOKE.	
Petition for Dissolution.—Co-Respondent dispensed with.—Wife living in a Brothel	183
HOOPEE v. HOOPEE.	
Petition of Wife on ground of Cruelty.—Record withdrawn by Consent.—Motion to set Cause down again for Trial	602
HOPE v. HOPE.	
Suit for Restitution of Conjugal Rights.—Previous Suit for Divorce by reason of Adultery.—Recrimination <i>par delictum</i>	94
KEATS v. KEATS AND MONTEZUMA.	
Dissolution of Marriage.—Condonation.—Evidence.—Damages.—Wife's Costs.—Annuity to Wife.—20 & 21 Vict. c. 85, ss. 32, 33	334
LEIGH v. LEIGH.	
Suit for Divorce <i>à mensâ et thoro</i> .—Decree for Costs in the Chancery Court of York.—Transference of Jurisdiction.—20 & 21 Vict. c. 85, s. 3	164

TABLE OF CASES.

xv

	Page
LING v. LING AND CROKER.	
Petition for Dissolution.—Previous Divorce and Crim. Con.	
Action.—Proof by Affidavit.—Practice	180
Damages and Costs in Crim. Con. Action.—Co-Respondent.	
—Costs	187
LLOYD v. LLOYD AND CHICHESTER.	
Adultery proved.—Collusive Prosecution of Petition.—	
20 & 21 Vict. c. 85, ss. 29, 30	567
MARCHMONT v. MARCHMONT.	
Judicial Separation by reason of Cruelty.—Mode of Trial .	228
MARSH v. MARSH.	
Judicial Separation at Suit of Wife.—Cruelty by a Husband	
addicted to Intemperance.—Custody of Children.—20 &	
21 Vict. c. 85, s. 35	312
MATTHEWS v. MATTHEWS.	
Petition for Judicial Separation.—Deed of Separation.—	
Lapse of Time	499
M'KECHNIE v. M'KECHNIE.	
Dissolution of Marriage.—Practice.—Proof of Scotch Mar-	
riage by Affidavit	550
MULLINEAUX, <i>Ex parte</i>.	
Desertion.—Protection Order.—Specific Property . . .	77
NORRIS v. NORRIS AND GYLES.	
Dissolution of Marriage.—Co-Respondent.—Right to be	
heard.—Costs under 34th sect.—Marriage Settlements .	174
PEACOCK v. PEACOCK.	
Petition for Judicial Separation.—Husband's Adultery.—	
Condonation not established	183
PECKOVER v. PECKOVER AND JOLLY.	
Petition for Dissolution.—Personal Service dispensed with .	219
POTTS v. POTTS AND ANOTHER.	
Petition for Dissolution of Marriage.—Previous Divorce and	
Crim. Con. Action.—Nominal Damages.—Mode of Trial .	181
PYNE v. PYNE, on Motion.	
Petition for Dissolution of Marriage at Suit of Wife.—	
Practice	80
PYNE v. PYNE.	
Dissolution of Marriage at Suit of Wife.—Adultery and	
Desertion.—Wife not a competent Witness to prove De-	
sertion.—14 & 15 Vict. c. 99, s. 4	178
PALMER v. PALMER.	
Suit for Dissolution.—Previous Sentence in Foreign Court.	

	Page
—Marriage and Cohabitation subsequent to such Sentence	551
PEARMAN v. PEARMAN AND BURGESS.	
Adultery of the Wife.—Cruelty of the Husband.—20 & 21 Vict. c. 85, s. 31	600
PELLEW v. PELLEW AND BERKELEY.	
Petition for Dissolution.—Lapse of Time	553
ROWBOTHAM v. ROWBOTHAM, on Motion.	
Petition for Dissolution of Marriage.—Service of Citation.—Practice	73
RATCLIFF v. RATCLIFF AND ANDERSON.	
Petition for Dissolution.—Application for Mode of Trial.—31st Sect. of Divorce Act	217
ROBINSON v. ROBINSON AND LANE.	
Petition for Dissolution.—Previous Sentence of Divorce.—Mode of Trial	179
ROBOTHAM v. ROBOTHAM.	
Dissolution of Marriage at Suit of Wife.—Order on Husband to secure Sum of Money to Wife.—Custody of Children.—20 & 21 Vict. c. 85, ss. 32, 35	190
ROBINSON v. ROBINSON AND LANE.	
Petition for Dissolution.—Co-Respondent.—Evidence.—Admissions by Respondent.—Competency of Witnesses.—Counsel.—Practice.—21 & 22 Vict. c. 108, s. 11.—Co-Respondent dismissed and examined as a Witness.—Effect of Wife's Admission of Adultery unsupported by confirmatory Evidence	362
RATCLIFF v. RATCLIFF AND ANDERSON.	
Jurisdiction.—Evidence.—Arrangement between Husband and Adulterer.—Costs.—Maintenance of divorced Wife	467
ROWLEY v. ROWLEY.	
Petition for Dissolution of Marriage.—Amendment of Petition by Addition of fresh Charge.—Affidavit	487
SAUNDERS v. SAUNDERS.	
Wife.—Divorce <i>à mensâ et thoro</i> .—Application to reduce permanent Alimony	72
SPRATT v. SPRATT.	
Petition for Dissolution at Suit of Husband.—Interim Order for Custody of Children	215
SEYMOUE v. SEYMOUE.	
Judicial Separation.—Desertion.—Permanent Custody of Children.—Practice	332

TABLE OF CASES.

xvii

	Page
SHIRLEY v. WARDROP (falsely called SHIBLEY). Suit for Nullity of Marriage.—Alimony <i>pendente lite</i> .—Ap- plication to reduce refused	317
SMITH v. SMITH. Wife's Petition for Dissolution.—Desertion not proved.— Decree for Judicial Separation	359
STUDDY v. STUDDY. Judicial Separation.—Construction of Agreement to live separate.—Adultery.—Leave and License.—Connivance	321
SELLER v. SELLER (on demurrer). Judicial Separation.—Adultery of Petitioner condoned no Bar	482
SUGGATE v. SUGGATE. Practice.—Pleading.—Insufficient Averment of Cruelty.— Cruelty to Children in Presence of Wife.—Permanent Custody of Children.—Evidence	489
SUGGATE v. SUGGATE. Judicial Separation.—Cruelty.—Condonation not pleaded, but appearing in Evidence.—Custody of Children	492
SUGGATE v. SUGGATE. Practice.—Taxed Costs against Husband.—Number of Coun- sel.—Expenses of local Attorney	497
TEAGLE v. TEAGLE AND NOTTINGHAM. Petition for Dissolution.—Costs refused against the Co-Re- spondent	188
THOMPSON v. THOMPSON. Judicial Separation.—Desertion by the Husband not esta- blished	231
TOMKINS v. TOMKINS. Judicial Separation at Suit of Wife.—Alimony <i>pendente lite</i> . —Practice under 25th Rule	163
Judicial Separation by Reason of Cruelty.—Function of Jury	168
TOMKIN v. TOMKIN AND ANOTHER. Petition for Dissolution.—Previous Divorce <i>à mensu et thoro</i> , and Damages in undefended Crim. Con. Action.—Co-Re- spondent dispensed with	182
TOURLE v. TOURLE AND ANOTHER. Petition for Dissolution.—Answer.—Practice in Pleading. —Affidavit in Verification.—Rule 15	165
Form of Record where Issue tried by Jury.—Co-Respond- ent appearing but not answering.—Right to be heard.— Costs	176

	Page
TOLLEMACHE v. TOLLEMACHE.	
Petition for Dissolution.—Previous Sentence in Scotland.—	
Lapse of Time.—Practice.—Costs	557
WRIGHT v. WRIGHT, on Motion.	
Amended Petition.—Practice	80
WARD v. WARD.	
Dissolution of Marriage at Suit of Wife.—Desertion.—Ad-	
jourment of Petition under 44th sect. of Divorce Act	185
WEBER v. WEBER AND PYNE.	
Petition for Dissolution at Suit of Husband.—Alimony <i>pen-</i>	
<i>dente lite</i> .—Costs of Wife	219
WELLS v. WELLS.	
Costs of Wife.—Plea of Condonation not established.—Prac-	
tice	308
WARD v. WARD.	
Judicial Separation.—Practice.—Alimony <i>pendente lite</i> .—	
Husband without Means.—Taxation of Wife's Costs or-	
dered.—Attachment for Non-payment of Alimony refused.	
—Leave for <i>Fi. Fa.</i> to issue granted	484
WILTON v. WILTON AND CHAMBERLAIN.	
Petition for Dissolution.—Previous Adultery of Wife con-	
doned.—Absence of Husband.—Costs	563
WHITE v. WHITE.	
Judicial Separation.—Cruelty of the Wife	591
YELVEETON v. YELVEETON.	
Suit for Restitution of Conjugal Rights.—Power of Wife to	
acquire a separate Domicil.—Domicil to found Jurisdic-	
tion of Court.—Domicil of an Irishman after enlisting in	
the Army.—Ireland and Scotland.—Jurisdiction.—Ten-	
ducci's Case, 1775	537
Y— v. Y—.	
Petition for Dissolution.—Application to Intervene.—Prac-	
tice	598

TABLE OF CASES

REFERRED TO IN THE JUDGMENTS.

IN THE COURT OF PROBATE.

	Page
<i>Alison v. Furnival</i> (1 Cr. M. & N. 277)	137
<i>Allen v. Maddock</i> (11 Moo. P. C. 427)	257, 510
<i>Amiss, Robert</i> , in the Goods of (2 Robert. 116)	440
<i>Armstrong v. Huddleston</i> (1 Moo. P. C. 491)	287
<i>Ashman, Ann</i> , in the Goods of (3 Curt. 756)	439
<i>Barlow v. Grant</i> (1 Vern. 255)	548
<i>Barnes v. Vincent</i> (5 Moo. P. C. 201)	414
<i>Barton v. Cooke</i> (5 Ves. 461)	548
<i>Bedford, John</i> , in the Goods of (5 N. C. 188)	538
<i>Bell v. Timiswood</i> (2 Phill. 22)	306
<i>Bremer v. Freeman</i> (10 Moo. P. C. 324)	454
<i>Brenchley v. Lynn</i> (2 Rob. 468)	464
<i>Brook v. Brook</i> (3 Sm. & Giff. 510)	423
<i>Bourget, Jean E. L.</i> , in the Goods of (1 Curt. 591)	13
<i>Budd v. Silver</i> (2 Phill. 215)	306
<i>Byrd, —</i> , in the Goods of (3 Curt. 117)	440
<i>Cambridge v. Rous</i> (8 Ves. 13)	128
<i>Cartwright v. Cartwright</i> (1 Phill. 90)	244
<i>Cecil v. Juxon</i> (1 Atk. 278)	52
<i>Chittenden v. Knight</i> (2 Lee, 559)	306
<i>Christian, —</i> , in the Goods of (2 Rob. 110)	440
<i>Collier v. Rivans</i> (2 Curt. 855)	455
<i>Colvin v. Fraser</i> (2 Hagg. 325)	60
<i>Conway v. Beazley</i> (3 Hagg. 639)	47
<i>Croft v. Croft</i> (3 Hagg. 311)	5
<i>Davis v. Chanter</i> (2 Phill. 50)	431
<i>Dobins v. Bowman</i> (3 Atk. 408)	302
<i>Doe v. Perks</i> (2 B. & Ad. 489)	157

	Page
Fettiplace <i>v.</i> Georges (1 Ves. Jun. 44)	127
Fisher <i>v.</i> Hepburn (14 Beav. 626)	128
Fox <i>v.</i> Marston (1 Curt. 491)	35
Greenwood <i>v.</i> Greenwood (3 Curt. App. 2)	244
Gregory <i>v.</i> The Queen's Proctor (4 N. C. 620)	530
Hall <i>v.</i> Ruddall (4 Kay and Johnson, 603)	292
Harrison <i>v.</i> Elwin and another (3 Q. B. 117)	8
Hodgson <i>v.</i> De Beauschesne (12 Moo. P. C. 285).....	456
Hudson <i>v.</i> Parker (1 Rob. 14).....	439
Israel <i>v.</i> Rodon (2 Moo. P. C. 51)	35
Johnson <i>v.</i> Johnson (3 Hare, 157)	524
Lamphir <i>v.</i> Creed (8 Ves. 597)	52
Lewes <i>v.</i> Lewes (16 Sim. 266).....	548
Lighton, Rev. Sir John, in the Goods of (1 Hagg. 325).....	19
Lolley's case (Russ. & R. C. C. 237)	47
Lord <i>v.</i> Colvin (28 L. J. 361)	455
Marston <i>v.</i> Doe dem. Fox (8 Add. Ell. 14)	35
Moore <i>v.</i> King (2 N. C. 45).....	440
Munro <i>v.</i> Munro (7 Cl. & Fin. 842)	9
Nepean <i>v.</i> Doe dem. Knight (2 Mee. & W. 894).....	54
Noel <i>v.</i> Jones (16 Sim. 309).....	548
Prinsep and the East India Company <i>v.</i> Dyce Sombre (10 Moo. P. C. 232)	286
Rex <i>v.</i> Hall (1 B. & C. 136).....	548
Rich <i>v.</i> Cockell (9 Ves. 369)	52
Roberts <i>v.</i> Phillips (4 Ell. & Bl. 450)	439
Ruddall <i>v.</i> Warren (1 Deane, 306).....	293
Saunders <i>v.</i> Saunders (6 N. C. 522)	61
Shellcross, Doe dem. <i>v.</i> Palmer (16 Q. B. 747)	70
Silver <i>v.</i> Stein (1 Drew, 295)	430
Somerville <i>v.</i> Somerville (5 Ves. 786)	455
Stracey, Sir Josias H., in the Goods of (1 Deane, 6)	146
Tambisco <i>v.</i> Pacifico (7 Ex. Rep. 816)	522
Tatnall <i>v.</i> Hankey (2 Moo. P. C. 342)	454
Trevanion, in the Goods of (2 Rob. 311)	440
Tugman <i>v.</i> Hopkins (4 M. & Gr. 400)	466

IN THE JUDGMENTS.

xxi

	Page
<i>Waring v. Waring</i> (6 Moo. P. C. 355)	156
<i>Warwick v. Greville</i> (1 Phill. 123)	306
<i>Welsh v. Phillips</i> (1 Moo. P. C. 302).....	60
<i>Whicker v. Hume</i> (7 H. L. Cas. 124)	455
<i>Williams v. Dormer</i> (2 Robert, 505)	47
<i>Woolley v. Green</i> (3 Phill. 215)	432
<i>Wright v. Doe dem. Tatham</i> (1 Ad. & Ell. 3)	149
<i>Winter v. Winter</i> (5 Hare, 525).....	525

IN THE COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

<i>Astley v. Astley</i> (1 Hagg. 714)	105
<i>Anichini v. Anichini</i> (2 Curt. 210)	483
<i>Beeby v. Beeby</i> (1 Hagg. 789)	104
<i>Barker v. Barker</i> (2 Add. 286)	323
<i>Beeby v. Beeby</i> (1 Hagg. 789)	483
<i>B. v. B.</i> (1 Eccl. & Adm. 248, 259)	620
<i>Briggs v. Morgan</i> (2 Consist. 324)	620
<i>Cawdrie's case</i> (5 Co. Rep. 1)	102
<i>Collett v. Collett</i> (3 Curt. 731)	586
<i>Carden v. Carden</i> (1 Curt. 558)	588
<i>Collett v. Collett</i> (3 Curt. 726)	588
<i>Dalrymple v. Dalrymple</i> (2 Consist. 54)	103
<i>D'Aguilar v. D'Aguilar</i> (1 Hagg. 782)	196
<i>Dysart v. Dysart</i> (1 Robert. 116)	213
<i>Dolphin v. Robins</i> (H. of L. Cas. p. 390)	584
<i>Dasent v. Dasent</i> (1 Robert. 802)	586
<i>Dasent v. Dasent</i> (1 Robert. 800)	589
<i>Evans v. Evans</i> (1 Consist. 35)	194, 592
<i>Govier v. Hancock</i> (6 T. R. 613)	107
<i>Guest v. Guest</i> (2 Consist. Rep. 323)	611
<i>Harris v. Harris</i> (2 Consist. 148)	194
<i>Holden v. Holden</i> (1 Consist. 453).....	194
<i>Hope v. Hope</i> (1 Swa. & Tris. 94)	483
<i>Harteau v. Harteau</i> (14 Pick. American Rep.)	591
<i>Kirkman v. Kirkman</i> (1 Consist. 409)	592

xxii CASES REFERRED TO IN THE JUDGMENTS.

	Page
Lloyd <i>v.</i> Lloyd and Chichester (1 Swa. & Tris. 567) ..	600
Mortimer <i>v.</i> Mortimer (2 Consist. Rep. 317)	103
Naylor <i>v.</i> Naylor (1 Hagg. 722).....	105
Oliver <i>v.</i> Oliver (1 Consist. Rep.)	196
Proctor <i>v.</i> Proctor (2 Consist. Rep. 292)	100
Pollard <i>v.</i> Wybourn (1 Hagg. 727, 728)	612
Regina <i>v.</i> Millis (10 Clk. & Fin.)	102
Regina <i>v.</i> Flinton (1 B. & Ad. 227)	107
Swift <i>v.</i> Swift (4 Hagg. 153)	619
Seton <i>v.</i> Seton (3 Phill. 147)	619
Tenducci's Case (In Consist. of London, A.D. 1775)	586
Westmeath <i>v.</i> Westmeath (2 Hagg. Sup. 70)	194
Waring <i>v.</i> Waring (2 Consist. 153)	194
Westmeath <i>v.</i> Westmeath (2 Hagg. Sup. 52)	197
Walker <i>v.</i> Walker (2 Phill. 153).....	501
Warrenden <i>v.</i> Warrenden (9 Bligh. 144)	586

JUDGES AND LAW OFFICERS.

Judge of Her Majesty's Court of Probate.

Right Hon. Sir CRESSWELL CRESSWELL.

Judges of Her Majesty's Court for Divorce and Matrimonial Causes.

1858-9.

The Lord Chancellor, The Lord Chief Justice of the Court of Queen's Bench, The Lord Chief Justice of the Court of Common Pleas, The Lord Chief Baron of the Court of Exchequer, The Senior Puisne Judge in the three last-mentioned Courts, and The Judge of H. M. Court of Probate by the title of Judge Ordinary; any two of whom, with The Judge Ordinary, to form the full Court.

1859-60.

In addition to the above,

All the other Judges for the time being of the Courts of Queen's Bench, Common Pleas, and Exchequer, respectively; The Judge Ordinary taking precedence next after The Lord Chief Baron of the Court of Exchequer.

Queen's Advocate-General.

Sir JOHN DORNEY HARDING.

Attorneys-General.

Sir FITZBOY KELLY.

Sir RICHARD BETHELL.

Solicitors-General.

Sir HUGH M'CALMONT CAIRNS.

Sir H. SINGER KEATING.

Sir WILLIAM ATHERTON.

FURTHER RULES AND REGULATIONS

FOR

HER MAJESTY'S COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

TO BE OBSERVED ON AND AFTER THE 11TH JANUARY, 1860.

*Made under the Provisions of 20 & 21 Vict. c. 85, 21 & 22
Vict. c. 108, and 22 & 23 Vict. c. 61.*

ALIMONY.

9. The wife, being petitioner in a cause, may proceed to file her petition for alimony at any time after personal service of the citation on the husband, or after service in some other mode substituted by order of the Judge Ordinary, or after he has dispensed with service on the husband; provided the factum of marriage between the parties is established by affidavit filed in the cause, and a copy of such petition shall be served personally on the husband; or application may be made to the Judge Ordinary to substitute some other mode of service or to dispense with service of the same.

10. The wife being the respondent in a cause must enter an appearance to the citation before she can file a petition for alimony. The husband being the respondent must enter an appearance to the citation before he can file an answer to a petition for alimony.

11. The wife may at any time after the answer of the husband to her petition for alimony has been filed, or, in case no answer has been filed, at any time after the expiration of the period allowed for filing an answer, proceed to examine witnesses in support of her petition, and move the Court to decree her alimony *pendente lite*, the same notice of such proceeding and motion as required by Rule 28 being first given to the husband, or, in case an appearance has been entered for him, to his proctor, solicitor, or attorney, unless the Court on motion made shall have dispensed with the service of such notice.

12. If the wife objects to the answer of the husband to her petition for alimony as insufficient, she may move the Court to order a further

and fuller answer to be given by him, or to order the attendance of the husband on the hearing of the petition, for the purpose of being examined thereon in open court.

13. No affidavits can be read or made use of as evidence in support of or in opposition to the averments contained in a petition for alimony, or in an answer to such a petition. But if the answer alleges that the wife has property of her own, she may answer that allegation by affidavit.

ENTRY OF APPEARANCE TO CITATION.

14. An appearance to a citation by or on behalf of the party cited may be entered at any time pending the proceedings in the cause, by leave of the Judge Ordinary, subject to such conditions as may be thought just.

15. After appearance entered by or on behalf of a respondent or co-respondent, they may be heard in respect of any question as to costs of suit, and the respondent may be also heard in respect to any question as to custody of children, although they have filed no answer to the petition in the principal cause, but they are not at liberty to bring in affidavits touching matters in issue in the principal cause, and no such affidavits can be read or made use of as evidence in the cause.

(Signed) CAMPBELL, C.
A. E. COCKBURN.
C. CRESSWELL.
WM. WIGHTMAN.
SAMUEL MARTIN.
J. WILLES.
G. BRAMWELL.
W. F. CHANNELL.
COLIN BLACKBURN.
H. S. KEATING.

INTRODUCTION.

HER Majesty's Court of Probate was established by 20 & 21 Vict. c. 77, entitled "An Act to amend the law relating to Probates and Letters of Administration in England;" and Her Majesty's Court for Divorce and Matrimonial Causes was established by 20 & 21 Vict. c. 85, entitled "An Act to amend the law relating to Divorce and Matrimonial Causes in England."

These Acts came into operation, by virtue of an Order in Council, on the 11th of January, 1858.

On the 12th of January, 1858, Sir CRESSWELL CRESSWELL took his seat as Judge of Her Majesty's Court of Probate, at Westminster. The Royal Letters Patent appointing him Judge of the Court of Probate having been read:—

The QUEEN'S ADVOCATE addressed the learned Judge as follows:—My Lord,—In the name and on behalf of the Bar, whose organ I am, and whose numerous attendance testifies its concurrence in the observations I am about to offer, I beg to tender you our most sincere and hearty congratulations upon your assumption of the office of Judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes. Believe me, my Lord, we esteem ourselves most fortunate in finding ourselves under the guidance of a Judge of such long experience and of such distinguished ability as your Lordship, and of one who is still in the full vigour of his mental and physical powers. For that particular branch of the profession

to which I have the honour to belong, I can sincerely say that, although we look back to the past with feelings of natural regret and of honest pride, we look forward to the future with hope and confidence. Removed, as we have been, somewhat unexpectedly (not, as we are well aware, by your Lordship's desire), from our ancient habitation, we still find ourselves at home under the shadow of that ancient Hall which has so long been dedicated to English law and justice; and I trust we may say with the fugitives of old, "*Non erimus regno indecores.*" We are deeply conscious that in a new Court, with a new procedure, we have much to learn, but we trust we have also something to impart. We shall gladly welcome our friends who belong to the other branches of the profession, and we have no doubt that we shall be received by them with courteous hospitality when, in the exercise of the extended rights which have been conferred upon us, we practise in their Courts. I trust we shall all work cordially and harmoniously together for the purpose of carrying to a successful issue the great experiment in jurisprudence which has wisely been entrusted to your Lordship's experienced hands, and of lightening, as far as we can, the serious weight of labour which has been cast on you. I need hardly say that in Doctors' Commons the most entire confidence has ever prevailed in the intercourse between the Bench and the Bar, and I trust that a similar feeling may soon take root and may long flourish here between your Lordship and that Profession in whose name I most heartily and cordially bid you welcome.

SIR CRESSWELL CRESSWELL: I return you and those gentlemen on whose behalf you have addressed me, my most cordial thanks for the kindness with which you have received me. I assure you unfeignedly that I stand much in need of some such encouragement as you have given me, for I cannot take my seat in this Court without feeling many anxious fears lest I should prove unequal to the discharge of the duties which I have taken upon myself. I am now fully assured of the kind feeling of the Bar. I also place the utmost confidence in

their learning and honour, and I am sure that their learning will supply me with the information which is necessary to enable me to discharge my duties, and that their honour will prevent them from attempting to use their learning as a means of misleading me. You have alluded to the long experience I have had in Westminster Hall, and to the interest manifested by the large attendance of the Bar on this occasion. If I have had the good fortune to acquire their goodwill and esteem in the exercise of my judicial office, I can only ascribe it to their doing me the justice to believe that I have ever been animated by an earnest desire to hold the scales equally between all men, to show no preference or personal feeling, but to deal even-handed justice to every one. I hope I may, without presumption, promise that during the rest of my judicial career, I shall pursue the same course, and happy shall I be if at the conclusion of the few years during which I shall hold my present office, I shall be able to carry with me the same good feeling which has been expressed towards me to-day.

REPORTS OF CASES

DECIDED IN THE

COURT OF PROBATE

AND IN THE

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

LATHAM AND DEE v. WOOLBERT, on the Admission
of a Responsive Allegation.

1858.

Will.—Constraint.—Influence.—Incapacity.

Jan. 20 & 28.

The admission of a responsive allegation, pleading in the earlier part the personal and testamentary history of the testatrix, and in the later part, that the paper in question was procured by her husband at a time when, by reason of extreme illness, she had not testamentary capacity, was opposed.

LATHAM & DEE
v.
WOOLBERT.

HELD, that the earlier part of the allegation, though in itself inadmissible as not affecting the issue, would, in combination with the averment of testamentary incapacity contained in the later part, be such evidence as a Judge could not properly withdraw from the consideration of a jury at a trial of the issue of testamentary competency, and must be admitted to proof accordingly.

This was a cause of granting letters of administration with the will, bearing date 7th July, 1857, annexed, of Ann Caroline Latham, wife of Charles Thomas Latham, deceased, promoted by Latham and Dee, the executors therein named, against Thomas Dedrich Woolbert, one of the executors of a will of the deceased, bearing date the 10th June in the same year.

The will of July was propounded in a simple allegation, on which the two attesting witnesses and Dee were examined.

The allegation now before the Court was responsive to this, and pleaded that the deceased was the natural daughter of T. D. Woolbert; that she and her mother lived with Woolbert

1858. till 1822, the deceased being then about sixteen years of age,
 Jan. 20 & 28. when they went to reside with W. Whitaker Clulow, and that
 the deceased remained with him till his death; that Wool-
 LATHAM & DEE bert was in the habit of occasionally seeing her from 1822
 v. till 1848, when he lost sight of her until May, 1857; that
 WOOLBERT. Clulow died in September, 1855, and left deceased personal
 property to the amount of between £8000 and £10,000, the
 interest to her separate use during her life, and, after her
 death, subject to her appointment by will; that deceased inter-
 married in October, 1855, with C. T. Latham. Other articles
 pleaded various wills procured by Latham from his wife in his
 favour, and his unkind treatment of her after the first testa-
 mentary paper so obtained; that in May, 1857, deceased
 caused advertisements to be inserted in the 'Times,' which
 resulted in a renewed intercourse with T. D. Woolbert, her
 father, in the same month; the instructions, drafts, and execu-
 tion of the will of June 10th; the weak state of health of de-
 ceased; her husband's discovery of the will of 10th June in
 favour of her father and his family; and the undue control and
 influence exercised by her husband; and more specially her
 state of body and mind on the 5th, 6th, 7th, and 8th of July,
 and her incapacity at that time for any testamentary act.

Dr. Addams, Q.C., and *Dr. Twiss*, Q.C., opposed the ad-
 mission of the allegation. I. As to all the earlier articles.
 There could be no such thing as undue influence vitiating a
 will, especially undue marital influence, without mental inca-
 pacity in the person influenced. II. As to the whole allega-
 tion. That the earlier articles did not pretend to set up a
 case of incapacity; that the later articles, in fact, only pleaded
 a weakened state of body on the 5th, 6th, 7th, and 8th July;
 and that the allegation as a whole was no answer to the alle-
 gation propounding the will.

The *Queen's Advocate* (*Sir J. D. Harding*) and *Dr. Robinson*
 contrà. *Cur. adv. vult.*

January 28. SIR C. CRESSWELL: In this case I have been called upon to
 decide whether an allegation brought in by Dedrich Wool-
 bert is admissible or not. On the 16th of November Latham

and Dee brought in an allegation propounding a will as the last will and testament of Ann Caroline Latham deceased, 1858.
January 28.

LATHAM & DEE
v.
WOOLBERT.

wife of Charles Thomas Latham, which was alleged in the ordinary form to have been prepared according to her instructions, and to have been duly executed by her on the 7th July, 1857, she being at the time capable of giving instructions and of executing her will, or of doing any other act requiring thought, judgment, and reflection. In answer to this an allegation, consisting of twenty-four articles, was brought in by Woolbert on the 9th December, and its admission opposed. The question was argued last week, when it appeared that the opposition was not to the form of any of the articles, but was general to the whole allegation as not giving any answer to the case made in support of the will. The earlier articles of the allegation contain the personal history of the deceased, Ann Caroline Latham, showing that she was the natural daughter of Dedrich Woolbert; that in 1822 she and her mother went to live with a person named Clulow; that until 1848 she and her father occasionally met, and always on affectionate terms; but that from 1848 till 1857 they lost sight of each other; that in 1855 Mr. Clulow died, having made a will whereby he bequeathed property to a considerable amount to the deceased; that in October, 1855, she intermarried with Charles Thomas Latham, and that he procured her to make a will; and he afterwards treated her with great unkindness, which induced her in 1857 to endeavour to discover her father, which she succeeded in doing by means of an advertisement in the 'Times' newspaper. Several articles then follow, alleging that she made a will, leaving to her father an annuity of £100, legacies to some other persons, and making her brother Frederick T. Woolbert residuary legatee; that she afterwards made another will and codicil under the coercion and undue influence of her husband in the month of June. Now all this has no direct bearing on the question whether the will propounded of the 7th of July was the will of Ann Caroline Latham, executed by her when in the possession of capacity to do so. It might be perfectly true that her husband prevailed upon her to make a will, and afterwards treated her with unkindness; that she afterwards discovered her father, and made a will, leaving legacies to him and others; that by the undue

1858. influence of her husband she was induced to make another
January 28. will and codicil in June; and yet it would not follow that she
LATHAM & DEE had not testamentary capacity to make another will in July,
v. and that the will propounded by the husband was not a valid
WOOLBERT. will; and if the allegation had gone no further, I should have
considered that it was inadmissible. But the 21st article is
directed to the will now in question. It is as follows:—"That
the said deceased was, on the 5th July last, extremely ill and
under the influence of delirium, brought on, in great measure,
by the said C. T. Latham having, contrary to the express
directions of her medical attendant, supplied her with spirits
and water; that on the following day (the 6th) the said deceased
was worse than on the previous day; that she, on that day,
suffered greatly from sickness and vomited blood and bile,
had a discharge from the uterus, and also a discharge of blood
from the bowels; that she had also a nervous twitching of the
hands, and was again under the influence of delirium, and in the
evening of the said day was under the impression that there were
devils in her room, when the said C. T. Latham had a candle brought
into the room to endeavour to convince her to the contrary; that
on the two following days (the 7th and 8th) the said deceased continued
much in the same state as on the two previous days; that on the
evening of the said 7th her medical attendant (who on his calling
in the morning had been prevented seeing her by the said C. T. Latham
sending word, contrary to the fact, that the deceased was asleep and
could not be seen) was, in consequence of her having got worse,
sent for, and on his seeing her found her quite unconscious and
unable to answer questions put to her by him, the medical attendant,
who, from her then state, expressed a wish that a physician should
be called in, to which however the said C. T. Latham objected, on the
ground that there was no necessity for it. And the party proponent
further alleges and propounds, in contradiction to the allegation
given in and admitted on the part of C. T. Latham and J. S. Dee,
the other parties in this cause, that the said deceased, on the said
5th, 6th, 7th, and 8th days of July was incompetent to transact any
matter of business requiring thought, judgment, and reflection." That
therefore alleges, not that the deceased was induced to execute it by coercion

or under the undue influence of her husband, but that she was at the time incompetent to transact any matter of business requiring thought, judgment, and reflection. It appears that, according to the rules of pleading which prevailed in the Ecclesiastical Court, a bare denial of capacity would not be allowed,—it was necessary to allege some facts from which an inference to the effect of a positive denial might be drawn. Now this 21st article avers that the deceased was on the 5th July under the influence of delirium; that on the 6th she was worse in health, again delirious, and in the evening labouring under delusions; that on the 7th and 8th she was much the same; that on the morning of the 9th (the day on which the will was executed) her medical attendant was not allowed to see her, a false reason being assigned for his exclusion, and that in the evening he found her quite unconscious and quite unable to answer questions. It seems to me, that these facts bear directly on the question of the competency or incompetency of the deceased, at the time when the will was executed; and had they been given in evidence on an issue to try that question before a jury, the Judge could not with propriety have withdrawn them from their consideration. Having then evidence bearing directly on the question, the former part of the allegation is no longer immaterial, and the facts therein stated may with propriety be taken into consideration in combination with those contained in the 21st article. I say nothing as to the strength or weakness of the case made in opposition to the will; it seems to me that it is a case which ought to be admitted to proof and considered by the Court. In *Croft v. Croft*, 3 Hagg. 311, Dr. Lushington, on the subject of admitting or rejecting averments, says, “The better and more discreet line to be adopted is, if a serious doubt arise as to the ultimate effect of any averment in a plea, to allow it to stand and come before the Court in proof; for then the utmost extent of mischief is to occasion some additional expense, while wholly to exclude the averment might work absolute injustice.” Acting upon that rule, which seems to be as applicable to a whole allegation as to a particular averment, I think I ought to admit this allegation to proof.

1858.

January 28.

LATHAM & DEE
v.
WOOLBERT.

1858.

January 28.

In the Goods of WILLIAM THOMAS NORRIS (deceased),
on Motion.

In the Goods of
WILLIAM THOMAS
NORRIS.

Administration.—Presumption of Death at Sea.—Advertisements in Newspapers dispensed with.

W. T. N., a settler in New Zealand, embarked 1st July, 1856, in a vessel bound for Sydney, on his way to England. The vessel never reached Sydney; and no intelligence, after inquiries had been instituted, having been obtained as to the vessel or any of those on board, she was supposed to have foundered at sea in some heavy gales which occurred at the time she was making the voyage in question.

HELD, that the death of W. T. N. was to be presumed; and that advertisements in newspapers for persons supposed to be dead may be dispensed with, when their history is known and traced to within a short period of their being last heard of.

This was an application for administration of the effects of W. T. Norris, who was supposed to have been lost at sea.

It was supported by three affidavits:—

1. By one made by his father, who deposed that the deceased, being a bachelor and intestate, was supposed to have perished at sea on or since 1st July, 1856; that in 1854 he settled in Canterbury settlement, New Zealand; that in December, 1855, by the death of an aunt, he became entitled to £20,000, and that in January, 1856, he (the deponent), by letter, apprised his son of that event, and suggested that he should return to England; that he had received from the deceased a letter in answer thereto, dated 13th May, 1856, (annexed to the affidavit), expressing his intention to return on settling his affairs, accompanied with a power of attorney authorising deponent to receive for and to transmit to him £3000 (part of the £20,000). That in November, 1856, a letter of credit for £3000, and a letter of advice, were dispatched by post to the deceased, both of which had been subsequently returned to this country by his agent in New Zealand. That according to a letter (annexed to the affidavit) received from his agent, he sailed from Nelson on 1st July, 1856, in a vessel called the *Wyvern* for Sydney, which was due there about the 1st August. That it had been ascertained, on inquiries instituted by several persons—amongst others, by an uncle of the deceased (the Bishop of Adelaide, in Australia)—that the

Wyvern had never arrived at Sydney; that there had been no tidings of the vessel, her cargo, or any of the crew or passengers; and that she was supposed to have foundered at sea in some heavy gales which occurred in the month of July, and from which other vessels making the same passage in the same month received considerable injury.

1858.

January 28.

In the Goods of
WILLIAM THOMAS
NORRIS.

2. By an affidavit of the London correspondent of the deceased's bankers at Lyttleton, who deposed that he had received communications from the manager of the deceased's bank at Lyttleton, that he had sailed in the *Wyvern*, which was supposed to have foundered at sea.

3. By an affidavit of T. R., clerk to the solicitors of the father, who deposed that he had ascertained by inquiry that the *Wyvern* belonged to Sydney; that its registered owner was a merchant of Melbourne; that he had not been able to discover at Lloyd's rooms that it was insured in this country or elsewhere, or that the owners had any agents in this country; that he had inspected files of newspapers published in New Zealand and Australia, and had discovered certain paragraphs in some of them (recited in the affidavit), to the effect that the *Wyvern* was supposed to have foundered; that upon inquiry at Lloyd's on the 24th of December last he had learned that, up to that date, no information had been received of the missing vessel.

Dr. Phillimore, Q.C., moved the Court "to decree letters of administration of the personal estate and effects of the deceased, as dying a bachelor and intestate on or since the 1st July, 1856, to be committed and granted to W. N., the natural and lawful father of the said deceased." He founded his motion on the three affidavits. Before making applications of this nature, it had not been unusual to insert advertisements in newspapers for the person supposed to be dead; but under the circumstances of the present case, this course had been deemed unnecessary.

SIR C. CRESSWELL: Advertisements in newspapers are very well, if nothing has been heard of a person for some time. Here, as you trace the history of the deceased up to a certain time, and then lose sight of him, I think they may be dis-

1858. pensed with. There is no reasonable doubt that he died at
January 28. the time supposed. *Motion granted.*

In the Goods
of WILLIAM
FRITH.

In the Goods of WILLIAM FRITH (deceased), on Motion.

Will.—Subscription of attesting Witness.

W. F. signed his will in the presence of two witnesses, A. and B. B. being unable to write, A., by his request, guided his hand when he subscribed the will.

HELD, that the subscription of B. was valid.

William Frith, late of Swansea, made a will on the 22nd of October, 1857, and died on the 26th of the same month. Having signed his name below the attestation clause, an affidavit of due execution was required in the Registry, from which affidavit it appeared that the hand of one of the attesting witnesses (who was unable to write) was, at his request, guided by his fellow-witness, when he subscribed the will.

As, since the passing of the Wills Act, no similar case had occurred in the Registry, the direction of the Court was required as to whether the will was sufficiently attested under 7 Wm. 4 and 1 Vict. c. 26, s. 9.

Dr. Robertson moved the Court to decree probate of the will, and cited *Harrison v. Elvin and another* (2 Gale & Dav. 769) (S. C. 3 Q.B. 117), which was a case exactly in point, and in which the Queen's Bench held "that the signature of a "subscribing witness, not knowing how to write, and whose "hand was guided, must be taken to be his signature."

SIR C. CRESSWELL: I am perfectly satisfied with the authority cited. *Motion granted.*

In the Goods of
JOHN JOSEPH
MARTINDALE.

In the Goods of JOHN JOSEPH MARTINDALE (deceased),
on Motion.

Will, with Power of Appointment to Married Woman.—Renunciation of the Executor and Universal Legatee in Trust.—Administration (with Will annexed) to the Nominees of the Married Woman appointed by Deed.

The deceased in this case died in June, 1857, leaving a will

bearing date the 6th March, 1855, of which James Weeks was constituted the sole executor and universal legatee in trust. The testator bequeathed the whole of his property, of the value of about £500, to the said James Weeks, in trust for such person or persons as Martha Brown, wife of James Brown, should, by any writing or writings under her hand, or by her last will, notwithstanding her coverture, appoint, and in default of such appointment, for her absolute, sole and separate use, free from all marital control. It appeared that James Weeks was unwilling to act under this will, and had by proxy renounced all his right to the probate of the said will, as also to letters of administration with the will annexed. Martha Brown, under power given to her in the will, had executed an indenture of appointment and assignment, by which she assigned all her estate and interest under the said will, and also the right of letters of administration with the will annexed, to Ebenezer Mariner and Henry William Judge, upon trust, for the purposes therein mentioned, in order that Mariner and Judge might apply for letters of administration with the will annexed, and they by the said indenture accepted the trust therein mentioned.

1858.

January 28.

In the Goods of
JOHN JOSEPH
MARTINDALE.

Dr. Deane, Q.C., moved the Court to decree letters of administration (with the will annexed) of the goods, chattels and credits of the deceased, to be granted to Ebenezer Mariner and Henry William Judge, as nominees of the said Martha Brown. He submitted that, if the Court had any doubt as to the effect of the indenture as an exercise of the power given to Martha Brown by the will, it might think it a case falling under the 73rd section of the Probate Act. He was not aware of any case in its circumstances approaching the present.

SIR C. CRESSWELL inquired whether the original indenture of assignment was in the registry.

On being informed that there was only a copy in the registry, the learned Judge directed that the original should be brought in and compared with the copy in the registry, and on that being found correct, that the grant should go as prayed.

1858.
January 28.
In the Goods of
LOUISA ED-
WARDS.

In the Goods of LOUISA EDWARDS (deceased), on Motion.

Will drawn by Stranger in Blood, who was principally benefited.

—Attesting Witnesses since dead.—Consent of Next of Kin.

Louisa Edwards died a widow, on the 4th January in the present year, having made her will, wherein she named William Edmonds sole executor. The will was dated the 31st January, 1854, but was not, in fact, executed till the 11th April in that year. The property was not above £350.

It appeared, from the affidavit of Edmonds, who was also the writer of the will, and took the largest share of the property, that the testatrix intended to execute her will in January, 1854, by making three crosses or marks thereto, but that this was done in the presence of one witness only. Afterwards becoming aware that two witnesses were necessary, she on the 11th April, 1854, acknowledged the marks opposite to her name to be her marks, and that it was her will, in the presence of Richard Knight and King Marshall, who made their marks thereto as witnesses, in the presence of the testatrix and of each other. These attesting witnesses were since dead, and no other person was present at the execution of the will. As Edmonds was a stranger in blood, the consent of the next of kin to the probate going to him had been obtained.

Below the signature of the testatrix were the words—

Executor, WILLIAM EDMONDS.

CHARLES TUBB, X my mark, 2nd Battalion Coldstream Guards;

the latter being the witness to the attempted execution of the will in January. Edmonds's appointment as executor was contained in the body of the will.

Dr. Deane, Q.C., moved the Court to decree probate to the executor therein named, omitting the words and mark above recited. The consent of the next of kin was in fact obtained, but no formal execution of such consent was yet prepared.

SIR C. CRESSWELL: The consent of the next of kin should be formally executed and brought into the registry; upon bringing it in the probate may go as prayed.

In the Goods of ANDREW MAIN (deceased).

1858.

January 28.

Administration.—Presumption of Death at Sea.—Payment of Policy by Underwriters.

In the Goods of
ANDREW
MAIN.

A. M. sailed from Liverpool in the *Brevet*, the 27th January, 1857, for Valparaiso. The voyage should have been made in ten weeks. Nothing had been heard of either the *Brevet* or crew since she left Liverpool. The *Brevet* was insured, and the underwriters had paid policy thereon, as upon a total loss.

HELD, that the death of A. M. was to be presumed; that payment of policy by underwriters was strong evidence in favour of such presumption.

A. Main, master and part owner of the ship *Brevet*, of Liverpool, sailed in her from thence, on the 27th January, 1857, on a voyage to Valparaiso. The ship never arrived at her destination: since she left Liverpool she had never been seen, heard of, or spoken to, nor had any on board of her been seen or heard of.

She was supposed to have been totally lost, with all on board; the underwriters had paid, as upon a total loss, the amount for which the ship was insured.

The above facts were deposed to by F. D. Anderson, of Liverpool, merchant, and part owner of the *Brevet*, and a member of the firm, who acted as ship's husband.

Dr. Phillimore, Q.C., stated that the voyage from Liverpool to Valparaiso, under ordinary circumstances, should have been made in ten weeks, and moved for a grant of administration of the effects of A. Main, as having died a bachelor and intestate in or since the month of July, 1857, to be decreed to E. W., his aunt, and one of his next of kin.

SIR C. CRESSWELL observed, that payment by the underwriters, of the amount for which the ship was insured, was very strong evidence in support of the motion.

Motion granted.

1858.
January 28.
—
PERRY
v.
F. H. DYKE.

PERRY v. F. H. DYKE, Esq. (the Queen's Proctor), in the Goods of EDWARD R. JAKES (deceased), on Motion.

Will.—Testamentary Incapacity.—Administration.

E. R. J. made a will, whilst of unsound mind, in favour of some charitable institution. The only party interested to support it being cited to propound it, or show cause why it should not be treated as void, did not appear. On an affidavit of the medical attendant of the deceased as to his testamentary incapacity, administration was granted to one of his next of kin, as in an intestacy.

Edward R. Jakes died January, 1857, leaving a holograph will, dated the 19th of May, 1825, in the following terms:—"I wish to leave all my money I am possessed of to the use of some charitable institution at my decease. Witness my hand, Edwd. R. Jakes."

A member of the Chancery Bar, who had been consulted on behalf of the next of kin of the deceased, was of opinion, that this bequest was not void for uncertainty, but was a good one in favour of charity, and that the particular mode of its application would be directed by the Queen's sign manual (*Morrice v. Bishop of Durham*, 9 Ves. 405).

The deceased being supposed to be of unsound mind when he made his will, W. Perry, one of his next of kin cited, in July last, the Queen's Proctor, as representing the Crown (who alone was interested to support it), either to propound it or to show cause why administration of the effects of the deceased, as dying intestate, should not be granted to him.

The Queen's Proctor had not appeared to the citation, and had intimated that it was not his intention to do so.

W. M., surgeon, deposed on affidavit, that from September 1823, up to the death of the deceased, he had been acquainted with him, and, with the exception of certain short intervals, had been his medical attendant; that in October, 1826, he had placed him in a lunatic asylum, where he remained until the following April: that from August, 1827, to his death he resided at Epping, a confirmed lunatic without intermission, under the deponent's constant care and supervision; and further, that during the whole of the period of the deponent's acquaintance with the deceased, he had been always consi-

dered and treated by himself and others as a person of imbecile mind, and wholly incapable of making a will.

The original paper had, subsequently to the death of the deceased, been lost, but there was an affidavit accounting for its loss, to which a collated copy of the original was annexed.

1858.

January 28.

PERRY

v.

F. H. DYKE.

Dr. Tristram, upon the affidavit of W. M., moved the Court "to decree letters of administration of the effects of "the deceased as dying intestate, to be granted, under the "usual security, to W. Perry the lawful cousin-german, and "one of the next of kin of the said deceased." In support of the motion he cited (*In the goods of Jean E. L. Bourget, deceased*, 1 Curt. 591), in which case Sir H. Jenner had granted a similar application, being satisfied from the affidavits, and upon the face of the paper (which was in very incoherent terms), that the deceased was insane; but he directed the paper to be left in the registry, in order that any one having an interest in it might propound it, should he think fit to do so. In the present case the copy, which had been collated with the original, would remain in the registry.

SIR C. CRESSWELL: On the authority of the case cited, I grant the motion.

In the Goods of JOHN JONES (deceased), on Motion.

In the Goods of
JOHN JONES.

Administration.—Next of Kin resident out of the United Kingdom.—20 & 21 Vict. c. 77, s. 73.

A. B. died a widower and intestate; his only son and the sole person entitled in distribution was resident in Australia; a legal representative being required immediately for the preservation of the property, administration for the use and benefit of the son was granted to his father-in-law under 73rd section of the Probate Act.

This was an application for administration of the goods of the deceased under the 73rd section of 20 & 21 Vict. c. 77; the person who, if that section had not passed, would have been entitled to the grant, being resident out of the United Kingdom of Great Britain and Ireland.

The deceased, late of No. 29, Ponsonby-terrace, Vauxhall-

1858. bridge-road, a carpenter, died on the 24th of December, 1857,
January 28. intestate and a widower, leaving Joseph Jones, his only child,
and the sole person entitled to his personalty. Joseph Jones
In the Goods of had been residing, since 1854, at Sydney, in Australia, and
JOHN JONES. had no duly-constituted attorney or other agent in Eng-
land. The deceased died possessed of certain furniture in his
lodgings, some leasehold houses, and moneys in savings-banks,
the whole supposed to be under the value of £600, but re-
quiring the immediate management and protection of a legal
personal representative of the deceased.

Joseph Jones, in 1854, married Elizabeth Riches, and the
present application was made on behalf of her father, George
Riches, for the use and benefit of his son-in-law, under the
provisions of the section above referred to.

The application was supported by the affidavits of George
Riches and William Clark, as to the facts above stated, and
of George Hobbs, verifying collated copies—1, of the register
of the marriage of George Riches in 1821; 2, of the baptism
of his daughter Elizabeth; 3, of the marriage of John Jones
and Mary Organ in 1830; 4, of the baptism of their son
Joseph Jones; 5, of the burial of Mary Jones; 6, of the
marriage of Joseph Jones and Elizabeth Riches.

Dr. Deane, Q.C., moved the Court “to decree letters of
“administration of all and singular the goods, chattels, and
“credits of John Jones to be granted to George Riches, for
“the use and benefit of Joseph Jones, the natural and lawful
“and only child, and only person entitled to the personal
“estate and effects of the deceased, now residing in Australia,
“and until he shall apply for the same, to be granted to him-
“self, on his giving justifying security, and being assigned to
“exhibit an inventory of the goods, chattels, and credits, within
“one month from the date of the letters of administration.”

SIR C. CRESSWELL: I think it may be done on the terms
proposed as to sureties.

In the Goods of FREDERICK BEDWELL (deceased), on Motion. 1858.

January 28.

Transference of Jurisdiction.—Practice.

A Requisition to New South Wales, under seal of Prerogative Court of Canterbury, to swear an administrator.

In the Goods of
FREDERICK
BEDWELL.

HELD, on consideration, that the Court of Probate can decree administration on the affidavits so sworn.

On the 21st July, 1857, a requisition issued, under the seal of the Prerogative Court of Canterbury, for swearing Frederick Garling, administrator with the will annexed of the goods of Frederick Bedwell, late of Paterson River, in the colony of New South Wales (deceased).

The requisition was directed to "His Excellency the Governor of Sydney, in New South Wales, his Lieutenant-Governor, or other competent judge;" and on the 9th of November, 1857, Mr. Garling was sworn before Samuel Frederick Milford, a Judge of the Supreme Court of New South Wales. The requisition and other papers had only been returned to this country within a fortnight of date of the present application.

On application to the registry for letters of administration with the will annexed, a difficulty was felt as to whether the Court of Probate could act on the affidavit of the intended administrator, sworn under a requisition which had issued under seal of another Court, namely, the Prerogative Court of Canterbury, now extinct.

Dr. Deane, Q.C., moved the Judge to decree letters of administration, with the will annexed, of the goods of the deceased, under the seal of Her Majesty's Court of Probate.

SIR C. CRESSWELL: I am anxious to place no formal difficulties in the way of suitors, but I doubt whether I have the legal power to act in such a case, and must take time to consider the point. It is an important one, and I understand that there are many similar cases. *Cur. adv. vult.*

On a later day, in the goods of Sophia Henderson Ludlow, deceased,¹ the learned Judge intimated that he had considered the matter and was prepared to act on affidavits so sworn.

¹ *Infra*, p. 29.

1858.

January 28.

In the Goods of GEORGE FRECKLETON (deceased), on
Motion.

In the Goods of
GEORGE
FRECKLETON.

Practice.—Probate Duty.

Probate was taken in the Prerogative Court of Canterbury to cover property, part of which was afterwards discovered to be without the province (in the diocese of Chester).

SEMPLE: Such grant is valid as regards the property in Chester under 20 & 21 Vict. c. 17, s. 87, on condition of the same amount of duty being paid, as would have been paid before this Act came into operation, if a separate grant had been taken out in Chester.

The deceased died at Cheltenham, in November, 1857, and on the 1st December his will was proved by his widow and sole executrix in the Prerogative Court of Canterbury. The probate was general in its terms, and not limited to property in the province of Canterbury. His personalty was sworn under £7000. It now appeared that only £5779 was within the province of Canterbury, and that the residue, viz. £540, being shares in the Liverpool Exchange, was without the province, and within the diocese of Chester; consequently, before the Act came into operation the Prerogative grant *quoad* the £540 would have been of no effect.

Dr. Deane, Q.C., moved the Court to confirm the probate heretofore granted under 20 & 21 Vict. c. 77, ss. 86, 87, 88. The revenue thereby would be no loser. The duty paid on the single grant already taken out was £120; whereas if two grants had been taken out, the duty on the whole property would have been only £111, viz. £100 on the £6000 within the province of Canterbury, and £11 on the £600 within the diocese of Chester.

SIR C. CRESSWELL: This case does not come within sec. 86, which applies to cases when the probate was void, on the ground of error as to *bona notabilia*. As it was a legal grant of probate, though not affecting the whole property, such a grant has by sec. 87 the same force and effect as if granted by the Court of Probate, and I am of opinion that it comes within that section. You don't want my assistance. The Act of the Legislature does for you what you ask me to

do. But inasmuch as if it had not been for the provision of 1858. this Act, probate must have been taken out in Chester, and January 28. duty must have been paid upon that grant, you must pay In the Goods of GEORGE FRECKLETON. under sec. 87 as much duty as you would have had to pay if you had taken out probate before the act came into operation.

In the Goods of HENRIETTA JOHNSON (Widow, deceased),
on Motion. In the Goods of HENRIETTA JOHNSON.

Will.—Substituted Executor in Case of Death of one of the original Executors.

A. made a will, and appointed B., C., D., and E. executors; and in case of the death of B., F. to be executor in his place. B., C., D., and E. proved the will. B. and C. died. F. applied to have a double probate granted to him. D. and E. opposing such grant:
HELD, that F. was entitled to the grant, and that the casualty was not restricted to the death of B. in A.'s lifetime.

The deceased in this case died on the 24th January, 1856, having duly executed her will and codicil, and thereof appointed John Blake, William Tyler, Joseph Roche, and William Gates, executors; "and in case of the death of the said John Blake, then I nominate and appoint John Joseph Blake, of the city of Norwich, gentleman, to be an executor hereof in the place of the said John Blake."

It appeared from a duplicate paper, that it had originally stood, "in the case of the death of the said John Blake in my lifetime," but the latter words had been effectually erased from the will before its execution.

In March, 1856, the four executors above named proved the will and codicil in the Prerogative Court of Canterbury. John Blake and William Gates had died since that date; John Blake leaving a will in which his son, the said John Joseph Blake, was appointed executor, and of which he took probate in September, 1857.

From the affidavit of John Joseph Blake, it further appeared that the bulk of deceased's property was acquired under the will of Charles Mills, of which will John Blake was, at the time of his death, the sole surviving executor and trustee, and

1858. the trusts of the will of Charles Mills, so far as they remain
 January 28. unperformed, had devolved upon John Joseph Blake as the
 representative of John Blake. That John Blake had, since
 In the Goods of HENRIETTA JOHNSON. 1831, acted as such trustee, and his son John Joseph Blake,
 having been his father's partner for twenty-five years, was
 intimately acquainted with the affairs both of the testatrix
 and Charles Mills, and that it was testatrix's intention that
 John Joseph Blake should succeed his father in the manage-
 ment of her affairs, whether the father's death might occur in
 the testatrix's lifetime or after her decease.

Dr. Addams, Q. C., moved the Court to decree a double probate of the said will and codicil, to be granted to the said John Joseph Blake, as the executor substituted in the will in the place of John Blake, deceased. On the face of it, this might seem to be a doubtful motion; but the case, *In the goods of the Rev. Sir John Lighton, Bart.*, 1 Hagg. 235, was, he thought, sufficient to ground it. The marginal note to that case was in the following words:—"A testator having appointed two executors, and provided that on the death of either of them two others should be substituted; on the death of the original executor, who had proved the will, and on a proxy of consent from the other, probate will be granted to one of the substituted executors, it appearing to have been the testator's intention that the substitution should take place on the death of either of the original executors, whether happening in the testator's lifetime or afterwards." The only circumstance mentioned in that case, which might be supposed to distinguish it from the present, was the consent of the surviving original executor, who had not taken probate, but whose right thereto had been saved. Such consent could not well affect the right of the substituted executor, whatever that might be; nor did it appear from the report that Sir John Nicholl, in granting that motion, had relied on that particular circumstance.

Dr. Twiss, Q. C., contra: The surviving original executors, for whom he appeared, had no interest in opposing this motion, but did not know how far they were justified in admitting Mr. John Joseph Blake's claim to probate. The distinction between this claim and *The goods of Sir John Lighton* seem to

be, that in that case there was no one entitled to act under the original probate; but here there was an outstanding grant, and two executors capable and willing to act. He submitted that it would be contrary to the policy of a Court of Probate to make a double grant under such circumstances. In that case also, the Court was induced to look into certain circumstances and determine the meaning of the words in the will "in case of the death of either of them."

1858.

January 28.

In the Goods of
HENRIETTA
JOHNSON.

SIR C. CRESSWELL: In granting Dr. Addams's motion, I proceed entirely upon the case cited, as to the construction of the will. I should be very loth to take any presumed policy of the Court of Probate as my guide. *In the goods of Lighton* there were, in fact, two decisions, for there was a grant of the Irish Court in the first instance, and that was acted upon by the Judge of the Prerogative Court in this country. Here there are ample grounds to satisfy me as to the intention of the testatrix. Blake, the father, was trustee and executor of the person from whom she received a considerable amount of property in a complicated state; and John Joseph Blake, as his father's partner, was conversant with the whole business. These are very good reasons why the testatrix should have desired him to succeed his father as her executor, and I cannot consider such substitution as limited to the casualty of the father's decease in the lifetime of the testatrix. (*Motion granted.*)

NICHOLS AND FREEMAN v. BINNS.

February 1.

*Citing Heir-at-law.—Infant Co-heir.—61 and following
Sections of 20 & 21 Vict. c. 77.*

NICHOLS AND
FREEMAN
v.
BINNS.

In a cause transferred from the Prerogative Court of Canterbury to the Court of Probate, before any allegation or declaration given in. HELD, that the provisions of the 61st and following sections of the Probate Act, as to citing heirs-at-law, applied—that the intent of the act was to prevent double trials—and that the fact of one co-heir being an infant and child of a plaintiff was no ground for the Court refusing to allow such co-heir to be cited.

This was a question arising on sections 61, 62, and 63, of the Probate Act, in a cause transferred from the Prerogative

1858.

February 1.

NICHOLS AND
FREEMAN
v.
BINNS.

Court of Canterbury to the Court of Probate. It was a business of proving in solemn form the last will of W. W. Parkinson, who died a lunatic, promoted by Nichols and Freeman, the executors under one of his testamentary papers dated the 15th of November, 1851.

Mary A. Binns, the niece of the deceased, and one of the surviving executors named in a will dated the 4th February, 1837, appeared in opposition thereto.

As the will of 1851 purported to dispose of real as well as personal property, the defendant's proctor had been summoned to attend before the Judge to show cause why a citation to see proceedings should not issue against Charles J. Freeman, son of one of the plaintiffs, and Mary Ann Binns, wife of H. B. Binns, the defendant, co-heirs of the real estate of the deceased in the above cause.

Dr. Addams, Q.C., moved the Court, as the will in question purported to dispose of real as well as personal property, to make an order to authorize the plaintiffs to cite the co-heirs of the deceased. The provisions of sec. 61 directly applied to the case.

Mr. Denman, for the defendant: The act does not necessitate the citation of the heir-at-law, but leaves it to the discretion of the Court; sec. 63 points out cases where it need not be done. The defendant might be prejudiced by citing the co-heir, who is an infant, and a son of one of the plaintiffs. By the citation he would have a right to become a party to the cause, and acquire a knowledge and avail himself of information which might be of importance to the defendant. It would be inconvenient for the defendant to be hampered with an infant co-defendant.

SIR C. CRESSWELL: I cannot see how any such prejudice or inconvenience could arise. You are not bound to join or concur with him in your defence. You may act independently of him. I don't think that you have shown any sufficient ground for imposing on the other parties the necessity of another trial. One of the great objects of the act was to prevent the possibility of a double trial on the same will, and this can only be accomplished by citing the heir-at-law. The 61st and 63rd

sections do not seem quite consistent; the former is more imperative in its terms than the latter.

1858.

February 1.

Mr. Denman: The present case raises also a point of practice, viz. whether this was in the words of sec. 61, "a proceeding taken under this act." *Taken* must mean *commenced*; whereas in this case an appearance was entered, and a contentious cause was in existence, before the act came into operation. This was a pending suit transferred under sec. 84.

NICHOLS AND
FREEMAN
v.
BINNS.

Rule 34 of the rules for contentious business, implies that the Judge may exercise a discretion as to citing the heir.

SIR C. CRESSWELL: I think, at this early stage of the cause, no answer or allegation in opposition to the will having been given in, but only an appearance and an assertion of the will, that the plaintiffs are still in a position to call upon the heir-at-law to appear, if they think fit. The case seems to me to be clearly within the spirit of the act. I do not think it would be a reasonable exercise of my discretion not to permit the citation on the heir-at-law to issue.

CARLESS v. THOMPSON.

February 5.

A Defendant suing in formâ pauperis condemned in Costs.

CARLESS
v.
THOMPSON.

W. T. obtained probate in common form of a paper professing to be the will of A. L. Such probate, at the suit of the next of kin of the deceased, was revoked, the Court holding that the paper in question was not the will of the deceased, and that W. T. had been guilty of fraud in obtaining probate of it, and in contesting the suit.

W. T., though suing *in formâ pauperis*, was condemned in the costs of the suit.

This was a suit transferred to this Court from the Prerogative Court under the 84th section of the Probate Act.

The defendant, W. Thompson, had cohabited for several years with Jane Lewis, the alleged testatrix in this case, and some months after her death, had obtained probate in common form of a paper professing to be her last will and testament, which bequeathed the whole of her property to himself.

A suit had been instituted by Mrs. Carless in the Prerogative Court with a view to obtain the revocation of such pro-

1858. bate, and, in lieu thereof, a grant of letters of administration of
 February 5. the effects of the deceased to be made to herself, as the sister
 and one of the next of kin of the deceased, on the ground that
 the will in question was a forgery.

CARLESS
 v.
 THOMPSON.

Dr. Addams appeared for Mrs. Carless.

Dr. Swabey, counsel assigned, for W. Thompson, who had been admitted to sue *in formâ pauperis*.

SIR C. CRESSWELL, after reviewing the evidence in the case, came to the conclusion that the will had not been established, the impression on his mind being that the paper in question was not the will of the deceased, and that the defendant had been guilty of a gross fraud in obtaining probate of it originally, and in contesting the present suit. He therefore directed the probate to be revoked, and administration to be granted as prayed by Mrs. Carless.

Dr. Addams prayed the Court to condemn the defendant in the costs of the suit.

SIR C. CRESSWELL inquired whether, by the practice of the Prerogative Court, a person suing *in formâ pauperis* could be condemned in costs.

Dr. Addams replied, that on sufficient grounds shown, it had been the practice of the Prerogative Court to do so.

SIR C. CRESSWELL, under the circumstances of the present case, condemned the defendant in the costs of the suit.

February 15. In the Goods of SUSANNA CLARKE (deceased), on Motion.

In the Goods of
 SUSANNA
 CLARKE.

Will.—Execution by Mark.—Wrong Name.

A will purporting to be that of S. Clarke, and delivered by her as such for safe custody to one of her executors shortly before her death, was executed by mark, against which appeared the name S. Barrell.

HELD, that there being no doubt as to the identity of the testatrix, her execution by mark was not vitiated by another person having written the wrong name against it.

The testatrix executed a will in 1844, by mark. Against

her mark the name Susanna Barrell (her maiden name) was written instead of Susanna Clarke, her real name, and the one by which she was described in the commencement of the will and in the testimonium clause.

1858.
February 15.
In the Goods of
SUSANNA
CLARKE.

Shortly before her death, she delivered the will in a sealed envelope to F., one of the executors named therein, in whose custody it remained until after her death, telling him "that she wanted him to manage for her." F. deposed that both the attesting witnesses were dead, that the will was in the handwriting of Sidney, one of them; and that he believed the word "Barrell" to have been a clerical error of Sidney's.

Dr. Deane, Q.C.: The execution satisfies the Wills Act. (*In the goods of Bryce*, 2 Curt. 325, and *In the goods of Clark*, ib. 329.)

SIR C. CRESSWELL: There is enough to show that the will is really that of the person whose it professes to be. Her mark, at the foot or end of it, is a sufficient execution, and that which some one else wrote against her mark cannot viti-ate it.

In the Goods of THOMAS GULLAN (deceased), on Motion.

Will.—Practice.—Presumed Revocation.

In the Goods of
THOMAS
GULLAN.

T. G. duly executed a will on six or eight detached sheets of paper. At the time of execution he subscribed his name at the foot of each sheet in the presence of the attesting witnesses, who thereupon also subscribed in his presence each sheet. On his death two of the middle sheets of the will only were found amongst his papers, and there was no trace of the remaining sheets.

On motion to decree letters of administration with these sheets, as the will annexed:

Held, that the signatures at the end of the will, being the only ones that satisfied the Wills Act, having been destroyed, the will must be presumed to have been revoked.

The deceased died in December, 1857, in his eighty-third year, leaving Lucy G., his widow, him surviving, but no other known relation. He left personal property to the amount of

1858. £9000, and certain real estate; he had also a power under his brother's will to charge in favour of his widow certain property, devised to himself for life, with an annuity of £100 per annum.

February 15. In the Goods of THOMAS GULLAN.

In 1855 he executed a will (prepared by himself without professional advice) on six or eight detached sheets of paper, by signing his name at the foot of each sheet in the presence of two witnesses, who thereupon, in his presence, subscribed each of the said sheets.

After his death diligent search was made for his will, but only two of the above sheets, viz. the third and fourth, were found among his papers, and no information could be obtained as to the remaining sheets of this will, or as to any other testamentary papers of the deceased, from the two solicitors whom he had professionally consulted, or at his banker's or elsewhere.

The two sheets found were, in their beginning and ending, insensible; but in their body the testator exercised the power of appointment given to him under his brother's will in favour of his widow, and also made a disposition of part of his own property to his widow and to some other persons. His widow deposed that he had frequently told her that on his death she should have his property absolutely, as he had no relations: and that he had made a practice of not destroying any papers relating to business until a few weeks before his death, when a great change came over his mental faculties, and that he then destroyed very many of such papers.

Dr. Deane, Q.C., moved for administration (with the said two paper writings annexed as containing the will of the deceased) of the effects of the deceased to be granted to his widow. There was no case exactly in point, *Ewin v. Franklin*, *Deane's Rep.*, p. 7, being one of imperfect execution, not of revocation, did not apply. Each of the sheets might be taken as a codicil.

SIR C. CRESSWELL: You would have been in a very different position, if no more than these two sheets had been executed. The signatures at the end of the last sheet were the only ones made in compliance with the statute. You cannot convert signatures not made in due compliance with the sta-

tute into valid signatures. The only execution in compliance with the statute having been destroyed, I cannot grant the motion. 1858.
February 15.

YOUNG *v.* OXLEY, in the Goods of WILLIAM OXLEY (deceased),
on Motion.

YOUNG
v.
OXLEY.

Intestacy.—Administration Bond given to the Bishop of Chester.

—*Quære, whether the Obligation survives to the Judge of the Court of Probate?*

An administration bond with sureties was given to the Consistory Court of Chester in 1854. In Jan. 1857 the Master of the Rolls directed the bond to be put in force in an action at law against the sureties. Before the requisite steps could be taken, the testamentary jurisdiction of the Court of Chester had ceased by virtue of the Probate Act. On motion to order the bond to be attended with, for the purpose of being put in suit at common law, the Court directed one of the registrars to assign it for that purpose; but *quære* as to its effect at common law.

The deceased in this case died in April 1853 intestate. In January, 1854, letters of administration were granted by the Consistory Court of Chester to his widow, Ann Oxley, she having entered into the usual administration bond to the Bishop of Chester with two sureties in the sum of £4000, for the due and faithful administration of the personal estate of the deceased.

The deceased was at the time of his death indebted to John Young, to the amount of £109. Young brought an action against the administratrix in the Queen's Bench, and obtained judgment in March, 1854, for £118. 4s. 2d., the amount of debt and costs. A suit in Chancery was subsequently instituted by Young against Ann Oxley, and an account was ordered to be taken, which showed a balance of £1026. 3s. 2d. due from her as administratrix, and £126. 15s., together with interest thereon, due to John Young, and Ann Oxley was ordered to pay the balance of the £1026 into the bank. This not having been done, the Master of the Rolls, on the 12th January, 1857, directed proceedings by an action at law to be taken against Hughes and Brandwood (the sureties in the bond), or one of them, for the purpose of putting in force the administration

1858. bond. The usual proceedings were taken in the Court of Chester, and a monition was decreed against Hughes and Brandwood to show cause why the administration bond should not be attended with for the purpose of being put in suit at common law. Before the monition was returnable the Probate Act came into operation, and the testamentary jurisdiction of the Court of Chester ceased.

February 15.
 YOUNG
 v.
 OXLEY.

Dr. Phillimore, Q.C., moved the Court to order the bond to be attended with for the purpose of being put in suit at common law. This could not be said to be one of the bonds mentioned in the 81st, 82nd, and 83rd sections of the Probate Act, yet the Court had authority to deal with it as a matter testamentary in a suit transferred with all its incidents to the Court of Probate (sect. 84).

SIR C. CRESSWELL: Let the bond be brought into the registry. When that is done, all I can do for you will be to direct one of the registrars to assign the bond, so that it may be put in suit at common law, and the Court of common law may deal with the question of its validity or invalidity as it may think fit.

HAMER
 v.
 BOREHAM

HAMER v. BOREHAM.

Pauper, Assignment of Counsel to.

A person suing *in forma pauperis*, to whom counsel has been assigned by the Court, cannot appear by another counsel, until there has been a renunciation, or a new assignment of counsel, or he has been dispauperized.

This was a suit which had been commenced in the Prerogative Court, and was transferred to this Court under the 84th section of the Probate Act.

The plaintiff was suing *in forma pauperis*; an advocate and proctor had been assigned to him by the Judge in the Prerogative Court, and had appeared for him in the proceedings in that Court, and now, without communication with his advocate or proctor, he had instructed a barrister and solicitor to appear for him.

Mr. Needham was about to make an application in this case. His client had been admitted to sue *in formâ pauperis*. 1858. February 15.

SIR C. CRESSWELL (interrupting him): Assuming there is no other objection to your motion, can a person suing *in formâ pauperis*, who has had counsel regularly assigned to him by the Court, argue the case by another counsel? I cannot hear you. The pauper should appear by the counsel who has been assigned to him.

HAMER
v.
BOREHAM.

Some renunciation, or a new assignment of counsel, or an act of dispauperizing should take place to entitle him to appear by another counsel.

In the Goods of JOHN ELWELL, Jun. (deceased), on Motion. February 24.

Diocesan Grant.—Bona notabilia *without the Diocese*.—
20 & 21 Vict. c. 77, ss. 86, 87, 88.

In the Goods of
JOHN ELWELL,
Jun.

Administration to the goods of A. was granted in the Consistory Court of Lichfield, in September, 1857. The property was sworn under, and the duty paid upon £9000. It was afterwards discovered that £3000 consols formed part of this amount. The Bank of England refused to register the letters of administration, which were certainly void under the old law. It was now sought to take the opinion or direction of the Court as to the effects of sects. 86, 87, 88 of the Probate Act on such a grant. No definite motion being made, the Court declined to give any opinion on the point.

John Elwell died in August, 1857, a widower and intestate, leaving an infant daughter. On 14th September, 1857, letters of administration were granted to the uncle of the infant by the Consistory Court of Lichfield, on which occasion the property was sworn under £9000, and £240 stamp duty was paid. It afterwards appeared that the deceased was possessed, at the time of his death, of £3000 consols, which sum was included in the total amount sworn to at Lichfield. The grant was therefore absolutely void under the old law; and the Bank of England had refused to register the letters of administration.

The 86th section of the Probate Act enacts, that "All grants

1858. of probates and letters of administration, made before the
 February 24. commencement of this Act, which may be void or voidable by
 In the Goods of reason only that the Courts from which respectively the same
 JOHN ELWELL, were obtained, had not jurisdiction to make such grants, shall
 Jun. be as valid as if the same had been obtained from Courts en-
 titled to make such grants."

The 87th section enacts, that " Legal grants of probates and administration made before the commencement of this Act, and grants of probate and administration made legal by this Act, shall have the same force and effect as if they had been granted under this Act ;" with proviso for payment of further stamp-duty in certain cases.

The 88th section enacts, " Provided that where any probate or administration has been granted before the commencement of this Act, and the deceased had personal estate in England, not within the limits of the jurisdiction of the Court by which probate or administration was granted, or otherwise not within the operation of the grant, it shall be lawful for the Court of Probate to grant probate or administration only in respect of such personal estate not covered," etc.

It was now sought to take the direction of the Court on the effect of any or all of these sections on the administration granted as above stated.

Dr. Deane, Q.C., after stating the circumstances of the case, observed that it differed from *The goods of Freckleton (a)*, where the grant was good as far as it went, but did not extend far enough.

SIR C. CRESSWELL : I do not wish to retract the opinion I expressed in the case of *Freckleton*, but it was extra-judicial.

Dr. Deane : The view I take is that the grant is made good by the Act, and is out of the hands of the Court.

SIR C. CRESSWELL : The difference between the grant in this case is, that it is in terms confined to the diocese of Lichfield, the London as well as the Prerogative grants are general in their terms. Suppose this Court were to be induced to grant

(a) *Supra*, p. 16.

an administration of goods within a particular district, would that give the administrator a right to goods elsewhere? 1858.
February 24.

Dr. Deane, was not asking for a grant, but for the opinion of the Court. In the Goods of JOHN ELWELL.

Dr. Phillimore, Q.C., was instructed on behalf of the Bank of England to say that they were ready to act on his Lordship's opinion.

SIR C. CRESSWELL: It will be time enough for me to come to a decision on the point, when you bring before the Court a definite motion which requires me so to do.

N.B. The prayer at the end of the paper was: "To decree that the said letters of administration are valid and extend to the whole of the personal estate of the deceased in England, or that the said letters of administration are valid and extend to so much of the personal estate of the deceased as was within the jurisdiction of the Consistory Court of Lichfield at the time of the death of the deceased; and that letters of administration of the personal estate and effects of the deceased, to which the aforesaid letters of administration do not extend, may be granted to the said Henry Elwell by Her Majesty's Court of Probate."

In the Goods of SOPHIA HENDERSON LUDLOW, Spinster
(deceased).

In the Goods
of SOPHIA
HENDERSON
LUDLOW.

Administration with Will annexed.—Residuary Clause.—Construction.—"Things."

In a will which contained specific bequests of several articles of plate, furniture, etc., the last specific bequest being that of £30:
HELD, that a bequest to R. S. of "the residue of my things" would not entitle R. S. to a grant of administration as residuary legatee.

This was a question as to granting administration with the will annexed, arising on the construction of the deceased's

1858.
February 24.

In the Goods
of SOPHIA
HENDERSON
LUDLOW.

will. The will was a holograph paper, dated September, 1842, and in page one, which contained bequests of £100 and of several small articles to R. Ludlow, a brother of the testatrix, there were certain interlineations and erasures. In page two the testatrix specified some small articles to be left "to my niece, Mrs. Sutton;" then on the next line by itself and on the right-hand half of the page, "and to her son R. Sutton, £30." Then, after a blank space of nearly three inches, "and the residue of my things I give to my brother, James Ludlow." There was no attestation clause, and neither of the attesting witnesses could speak as to the condition of the will at the time of its execution. James Ludlow was the brother and only next of kin of the deceased.

Dr. Deane, Q.C., moved for administration with the will annexed to James Ludlow, as residuary legatee, and that the probate should include the alterations in page one and the words in page two, "and to her son Robert Sutton, £30." The word "things" in the residuary clause might be construed in reference to the next preceding bequest of "£30 to Robert Sutton," so as to include property of the same nature, and to give James Ludlow the general residue.

SIR C. CRESSWELL: It is very much guesswork in these cases. From a close inspection of the will the residuary clause, which would be last written, and which I am disposed to think was last written, is in a darker ink. That which is written on the erasures is also in a darker ink. It is very questionable whether the bequest to Robert Sutton was not introduced subsequently to the execution of the will. However, as there is nothing to show that it was, it may stand. I cannot construe "the residue of my things" so as to carry the general residue. The word "things" here must be taken *ejusdem generis* with the things enumerated in the body of the will. Decree letters of administration, with the will annexed, to James Ludlow, as next of kin, but without the alteration in the first page.

1858.

February 27.

In the Goods of SAMUEL WILLIAM LEWIS (deceased), on
Motion.

In the Goods
of SAMUEL
WILLIAM
LEWIS.

Will.—Custody of Testator.—Revocation.

A. made his will, being in extreme illness, on the 15th of December, and placed it in his mother's custody. At his request his mother gave it to him on the 21st. On the 22nd he died, and the will was found under the bolster of his bed, with the signatures and attestation clause torn off; the latter were nowhere to be found. A. had expressed no dissatisfaction with his said will.

On motion for probate of the paper to his widow as executrix :

Held, that the will was revoked.

The deceased, in this case, died on the 22nd of December, 1857; on the 15th of the same month, being then in extreme illness, he requested his cousin, Robert Lewis, to prepare a will for him, which was accordingly done, and the will was duly executed; it was then, by the deceased's desire, delivered to his mother, Rebecca Lewis, who retained possession of it till the 21st of December, when, at the deceased's request, she redelivered it to him in the same state as it had been delivered to her after the execution. On the following day the deceased died, and whilst his body was being laid out, the will was discovered under the bolster of the bed upon which he was lying, but that part of it which had contained his signature, and the attestation clause and signature of the subscribing witnesses was torn off and could not be found. The deceased, after executing his will, expressed his satisfaction at having done so to Robert Lewis, who continued in attendance upon him till his death. It did not appear that the deceased, in any way, mentioned the subject to any other person. Under these circumstances his widow, who was appointed executrix of the will, wished to take the opinion of the Court of Probate.

Dr. Waddilove moved the Court to decree probate of the paper to the widow as executrix therein named, but presumed that the Court would feel itself unable to do so.

SIR C. CRESSWELL : I must, of course, reject your motion. The widow is entitled to a grant of letters of administration of the goods of the deceased as dead intestate.

1858.

February 27 &
March 2.

In the Goods of WILLIAM BROWN (deceased), on Motion.

In the Goods of
WILLIAM
BROWN.*Will.—Revocation.*

The destruction of a second will, itself revoking one of prior date, does not reinstate the first will, even though it may be in existence at the testator's death. Parol evidence admitted as to the contents of the second will.

William Brown died in February, 1857, leaving a widow and six children,—the youngest, a daughter, being still a minor. He was possessed of real property to the amount of £40,000, and of personalty in value above £10,000. On the 6th of November, 1846, the deceased duly executed a will, disposing of his real and personal property, which was before the Court annexed to the affidavit of his widow.

On the 21st of July, 1855, the deceased executed another will, disposing of his real and personal estate, of a different tenor and with a different appointment of executors, thereby revoking the will of 1846, which, however, was found in his possession at his death, though not among his papers of moment and concern. The will of 1855, when executed, was delivered to the deceased, who said he should possibly leave it at his banker's; this he never did; and since his death diligent search had been made for it, but it not having been found, the presumption arose that it was destroyed by himself. Neither the instructions for, nor any draft of, the will of 1855 were in existence, having been destroyed by the deceased himself at the time of executing it; but the substance or contents of such will were deposed to by Robert Breckon, of Whitby, the confidential solicitor of the deceased, who had drawn and been an attesting witness to both of the said wills.

In consequence of doubt being felt as to whether the deceased died intestate, or whether the will of 1846 was operative as to the real estate, his eldest son and heir-at-law brought an action of ejectment, which was tried at Guildhall on the 15th of December, 1857, before Lord Campbell and a special jury, when a verdict was found for the plaintiff, subject to the opinion of the Queen's Bench on a special case,—the questions for the opinion of the Court being: First, was the will of July, 1855, proveable by parol for any purpose; if so, was the will

of November, 1846, revoked thereby? Secondly, if the will of November, 1846, was so revoked, did the deceased William Brown (the father) die intestate, or was the will of 1846 an operative will on the death of the said deceased?

1858.

February 27 &
March 2.

In the Goods of
WILLIAM
BROWN.

The special case was argued in the Q.B. on the 26th of January in this year, when the full Court unanimously held:—
1. That the will of 1855 was proveable by parol, and that the first will was revoked thereby. 2. That William Brown the father died intestate: and thereupon judgment was entered for the plaintiff, the heir-at-law.

On affidavits of the widow, of Mr. Breckon the solicitor, and of Robert Porritt, one of the executors named in the will of 1855,

Dr. Addams, Q.C., moved the Court to decree letters of administration of the deceased's effects, as dead intestate, to the widow of the deceased.

SIR C. CRESSWELL asked to be furnished with a copy of the judgment in that case before he disposed of the motion.

Cur. adv. vult.

SIR C. CRESSWELL: This question arises under peculiar circumstances. The deceased made a will, and some years after he made another will, revoking the first; the second was not to be found after his death, and the ordinary presumption that he had destroyed it *animo revocandi* must, in the absence of any evidence to the contrary, prevail. The Court of Q.B. have come to the conclusion that parol evidence to prove the contents of the second will (all due search having been made for the instrument itself) might be received. By such evidence it is clearly proved, that a will was executed, by which the first was revoked. It is also clear that the destruction of this second will cannot reinstate the first (see the 22nd section of the Wills Act): I must decree administration of the goods of the deceased as dead intestate.

March 2.

1858.

February 27.

DE CHATELAIN *v.* PONTIGNY, on Motion.

DE CHATELAIN *Administration pendente lite, under the 70th Section of the*
Probate Act, granted to the Defendant in the Suit, the
Plaintiff not opposing.
 v.
 PONTIGNY.

Mr. Denman: This was a testamentary suit, and the present application was under the 70th section of the Probate Act, that the Court would decree administration of the effects of the deceased *pendente lite* to the defendant in the cause. He understood that there was no opposition to this motion.

Dr. Phillimore, Q.C.: The parties for whom he appeared were not inclined to oppose this application, on the understanding that it would be no prejudice to them as regarded the main suit.

SIR C. CRESSWELL: In that case, the administration may go as prayed *pendente lite*; otherwise I should have thought some person unconnected with the suit would have been a more proper person to have been appointed.

March 2.

In the Goods of THOMAS CADYWOLD (deceased), on Motion.

In the Goods of
 THOMAS
 CADYWOLD.

Will.—Marriage and Birth of Child.—Revocation.

A., in 1828, made his will in contemplation of his intended marriage, providing for his intended wife, and for the children of such marriage, and making his intended wife executrix.

Held, that the marriage which ensued, together with the birth of a child, operated as a total revocation of such a will.

T. C. died in 1857, leaving a duly executed will, dated the 29th March, 1828, whereof he appointed Elizabeth Soundy, spinster (afterwards Elizabeth Cadywold), his intended wife, and two others, executors.

By his will he devised all his real estate to E. Soundy, his intended wife, for life, and after her death he directed his executors to sell the same, and bequeathed the money to arise from such sale to and amongst all and every his child or chil-

dren by his said intended wife living at his decease or born in due time afterwards, and the residue of his personal estate he bequeathed to Elizabeth Soundy, his intended wife, for her own use absolutely.

1858.

March 2.

In the Goods of
THOMAS
CADIWOLD.

Subsequently to the execution of this will the deceased intermarried with Elizabeth Soundy, and died leaving his said wife and four children of the marriage him surviving. Mrs. Cadywold having been at first advised that the will was valid on the authority of *Kenebel v. Scrafton*, 2 East, 541, applied to the registry as executrix (the two other executors having renounced) for probate, and was there directed to make application to the Court.

Dr. Addams, Q.C.: By the old rule of the Ecclesiastical Courts marriage with the birth of a child operated only as a presumptive revocation of a will made before marriage. The presumption of revocation might be rebutted by evidence of intention, that the will should not be revoked; and in deciding the question of intention, the fact of provision having been made for the intended wife and children or otherwise would have been taken into consideration. Thus, in *Fox v. Marston*, 1 Curt. 494, Sir H. Jenner admitted an allegation pleading parol evidence to rebut the presumption of revocation; but in the same case, on the question of devise (*Marston v. Doe dem. Fox*, 8 Ad. & El. 14), the Court of Ex. Ch. decided that the revocation of a will made before marriage took place in consequence of a rule or principle of law quite independent of any question of intention of the party himself; and this decision was followed by the Judicial Committee in the case of *Israel v. Rodon*, on appeal from the Court of Ordinary in Jamaica, 2 Moo. P.C.C. 51. He was instructed to move for probate of this paper; but such being the law, he apprehended it could not be granted.

SIR C. CRESSWELL: It seems at first sight rather startling to say that a will like the present, executed in contemplation of marriage, and providing for the wife and children of the marriage, should be revoked by such marriage and the birth of a child; but on the cases you have cited, there is no doubt that the law so stands, and I must reject the motion for probate.

1858.

March 5.

In the Goods of JOHN PERCIVAL WILLMOTT (deceased), on Motion.

In the Goods of
JOHN PERCIVAL
WILLMOTT.

Will.—Memorandum.—Codicil.

A. executed his will in February, and a codicil on the same paper in December; below the signature to the will, and before the commencement of the codicil, appeared a memorandum, which, from the evidence of the solicitor who prepared the will, had been written on the paper before the execution of the will.

HELD, that the memorandum, being no part of the will as originally executed, was not entitled to probate by reason of the duly-executed codicil of subsequent date, such codicil referring merely to the will.

The deceased executed his will on the 3rd February, 1854, on a sheet of letter-paper, of which the will occupied the first and part of the second page; below the subscriptions of the testator and attesting witnesses, the following words were written: "I have made no bequest to my daughter Mrs. Kay, because I provided for her in my lifetime. I request those who will have my plate to allow my wife the use of the same during her life."

On the 13th December, 1854, the deceased executed a codicil to his will on the third page of the same sheet of letter-paper; the codicil had no reference to or bearing on the above-recited words, which were below the signature to the will. The same witnesses attested the codicil and the will, but they could not remember whether the words in question were or were not on the paper at the time of the execution of either the will or codicil. From the affidavit of the solicitor who prepared the will, it appeared that the words were written before the paper was forwarded to the testator to be executed, below the place where the testator was intended to sign his name, and that such words were never meant to form part of the will, but merely to serve as an explanation and memorandum.

Dr. Swabey submitted that the words in question clearly formed no part of the will at the time it was executed, and that the codicil, though written on the same sheet of paper, yet referring merely to the will, could not give effect to that which was originally no part of the will; he moved the Court to decree probate of the will and codicil to the executors, without the memorandum at the foot of the will.

SIR C. CRESSWELL: I can only take the solicitor's affidavit as evidence of the time when the words were in fact written: I can pay no attention to his evidence of intention; that would be admitting parol evidence to affect a written instrument; but, on the face of the papers, I think you are entitled to probate as prayed, without the words at the bottom of the second page.

1858.

March 5.

In the Goods of
JOHN PERCIVAL
WILLMOTT.

ROBINS AND PAXTON v. DOLPHIN.

*Revocation of Will.—English Marriage.—Scotch Divorce.—
Bond-fide Domicil.*

January 28,
February 1 & 8,
and March 5.

ROBINS AND
PAXTON
v.
DOLPHIN.

A., a domiciled Englishman, married B., an Englishwoman, in England. Differences having arisen between them, a separation by mutual agreement took place. A. having subsequently to their separation gone to Scotland, but without any apparent intention of making that country his permanent residence, committed adultery there. The Lords of the Court of Council and Session, when he had been resident in Scotland for nearly six months, at the suit of B., his wife, made a decree dissolving their marriage by reason of his adultery. B. subsequently in due form married a domiciled Frenchman, and died resident in France. Shortly before her death, she made at Paris a holograph will, valid according to the law of France, revoking all previous wills.

Held, that A., by his residence in Scotland, did not acquire a Scotch domicil, so as to distinguish this case from *Lolley's case*¹ and *Conway v. Beasley*,² and that the English marriage of A. and B. was not dissolved by the Scotch decree of divorce. That a Scotch sentence of divorce, purporting to dissolve a marriage, if not good for the purpose for which it was intended, could not have the effect of a divorce *à mens et thoro*, so as to enable B. to acquire a domicil independent of that of A., her husband. That B.'s domicil being at the time of her death English, the will she executed at Paris not having been executed according to the law of the country of her domicil (England), was inoperative to revoke a previous will and codicil made by her in pursuance of a power and in conformity to 7 Wm. IV. & 1 Vict. c. 26.

This was a question as to the admission of an allegation responsive to one propounding the last will and testament and a codicil, respectively bearing date the 11th of April, 1854, of Mary Ann Dolphin, the wife of Vernon Dolphin, made in pursuance

¹ Russ. & B. C. C. 237.

² 3 Hagg. Ecc. Rep. 639.

1858.
January 28,
February 1 & 8,
and March 5.

ROBINS AND
PAXTON
v.
DOLPHIN.

of a power reserved to her by an indenture made subsequently to her marriage with her said husband, bearing date the 15th of November, 1839: these testamentary papers were propounded by Robins and Paxton, the executors therein named.

The allegation was brought in by Mr. Dolphin, the alleged husband of the testatrix. It pleaded:

The marriage on the 16th of July, 1822, of Vernon Dolphin and Mary Ann, otherwise Marie Eustelle de Pontes, wife of Amedee Theodore Davisies de Pontes, falsely called Mary Ann Dolphin, wife of Vernon Dolphin, then Mary Ann Payne, spinster, in the parish church of St. George, Hanover-square, Middlesex.

An indenture, dated the 1st of April, 1823, between Vernon Dolphin and Mary Ann, then his wife, formerly Mary Ann Payne, and certain other parties, being a settlement executed in pursuance of certain articles of agreement of the 15th July, 1822.

The cohabitation of the parties till a separation was mutually agreed upon in November, 1839, and their living separate thereafter, but continuing man and wife till some time in the year 1854, when a divorce was obtained by the said Mary Ann Dolphin.

A deed or declaration of trust of certain properties of the 15th of November, 1839, under which Mary Ann Dolphin had a power of appointment, notwithstanding coverture, by deed or by will, and in default of such appointment in trust for Vernon Dolphin, his executors, etc.

The seventh article was in the following words: "That the party deceased in this cause having sometime in the beginning of the year 1854 discovered that the said Vernon Dolphin was then living in adultery, and was then resident and domiciled in Scotland, and that he had been so resident and domiciled in and near Edinburgh from the month of February, 1854, she proceeded to Edinburgh, and on the 17th of June in that year instituted an action of divorce before the Lords of the Court of Council and Session in Scotland against her then husband, the said Vernon Dolphin, on the ground of adultery; and thereupon such proceedings were taken and proofs adduced, that the said Court, by their decree, dated the 20th of July, 1854, found the said Vernon Dolphin guilty of adultery, and therefore divorced and separated him from the said Mary Ann

Payne or Dolphin, her society, fellowship, and company in all time to come, and declared that he had forfeited all the rights and privileges of a lawful husband; and that the said Mary Ann Payne or Dolphin was entitled to live single or marry any free man as if she had never been married to the said Vernon Dolphin, or as if he were naturally dead. And the party proponent expressly alleges and propounds that by such decree the said Mary Ann Payne or Dolphin became and was from and after the said 20th of July, 1854, absolutely divorced from the bond of matrimony with the said Vernon Dolphin, and free to marry any other man."

1858.
January 28,
February 1 & 8,
and March 5.

ROBINS AND
PAXTON
v.
DOLPHIN.

The remaining articles, among other things, pleaded: The lawful marriage of Mary Ann Payne, on the 8th of October, 1854, after proclamation in the church of St. Mary, in Edinburgh, according to the rites and ceremonials of the church of Scotland, with Amédée Theodore Davisies de Pontes.

The proclamation in France when a marriage is contracted between a native subject of France and a foreigner out of that country, which is necessary by the French law to the validity of such a marriage in that country.

That De Pontes was a native of Paris, and at the time of such marriage domiciled at La Rochelle.

The deceased's adoption of the Romish faith and change of name on her reception into that church in 1855.

That after the marriage and proclamation as aforesaid, General de Pontes and the deceased cohabited as man and wife, and eventually took up their permanent residence at Paris, where they continued to live together (never again visiting either Scotland or England) until a short time before the deceased's death, when General de Pontes placed his wife in a convent in Paris, wherein she died.

That a will was in fact made by the deceased on the 3rd of April, 1856, at the solicitation of General de Pontes, in which he was named the universal legatee.

That the deceased did subsequently write with her own hand a paper in the words following:—"I revoke all foregoing wills made by me up to this date, 23rd June, 1856, Paris:" and set and subscribed her then names of Marie Eustelle Davisies de Pontes thereto, and placed the same in an envelope, which she indorsed and signed as follows:—"Last will

1858.
January 28,
February 1 & 8,
and March 5.

ROBINS AND
PAXTON
v.
DOLPHIN.

which I have made this day, the 23rd June, 1856, Marie Eustelle Davisies de Pontes.”

That by reason of the premises the deceased was on the 23rd of June, 1856, and at her death, lawfully domiciled in France.

That by the law of France, then and still in force, such a holograph will is good and valid to all intents and purposes.

The 25th and 26th articles pleaded and set out a bill filed in the High Court of Chancery by General de Pontes, setting up a deed conferring upon him substantially the same benefit as the will and codicil propounded.

Thus it appeared that Mr. Dolphin was interested in maintaining the French domicile of the deceased, which depended on the effect of the Scotch sentence of divorce, as he would be entitled under the deed of 1839 to the property over which she had a disposing power in the event of her having died by virtue of the instrument of June, 1856, in effect, intestate; while the executors of the will of 1854 would maintain the invalidity of the divorce; that the deceased had died the wife of Mr. Dolphin; that her domicile would be presumed to have continued the same as her husband's (English); and that the instrument of June, 1856, not having been executed according to the English law, was inoperative as a will.

Dr. Addams, Q.C., and Dr. Spinks, for the plaintiffs: This allegation should be either rejected *in toto*, or, if admissible, should be reformed. 1. It is submitted that it should be rejected *in toto*. The question before the Court is the title of the will and codicil of the 11th of April, 1854, to probate. For the defendant, it will be contended that they were effectually revoked by the instrument of the 23rd of June, 1856, and are therefore not entitled to probate. The grounds, upon which the validity of this latter instrument is rested, are, that the deceased, at the time of its execution and of her death, was a domiciled Frenchwoman; that, as such, it was competent to her to make a will in conformity to the law of France; and that this instrument (being holograph) is by such law valid as a will. Admitting its validity, if made by a domiciled Frenchwoman, it is contended for the plaintiffs, that the domicile of the deceased, at the time of its execution and of her death, was English and not French. This, then,

is the first question upon which issue is joined, viz. whether the deceased's domicile was English or French. To establish that her domicile was French, it will be contended for the defendant, that her marriage with Mr. Dolphin, which was an English marriage, was dissolved by the Scotch sentence of divorce, dated the 20th of July, 1854, so as to entitle her to marry again; and that, having been in due form married to General de Pontes, she became his lawful wife, and as such acquired his domicile, which was French. In point of fact, the real question intended to be raised by this allegation is, the effect of a Scotch sentence of divorce on an English marriage, the parties to which were at the time of such sentence domiciled in England. But it is submitted, that the invalidity of such a sentence on an English marriage was so definitively settled in *Lolley's case*, Russ. & R.C.C. 237. (the principle of which decision was recognized in *Warrender v. Warrender*, 2 Cl. & Fin. 540: see especially Lord Lyndhurst's remarks: "That if he conceived the judgment about "to be adopted in that case were understood as affecting "that delivered in *Lolley's case*, he should feel it his duty to "object to so dangerous and precipitous a course, and should "recommend, before pronouncing final judgment, the principles of the law to be reviewed, and the opinions of the "Common Law Judges to be obtained on the whole case." Ib. 558; and again, in *Geils v. Geils*, Macq. H. L. Cas. 255, see Lord St. Leonards's remarks, ib. 263): that this Court will not feel itself now at liberty to allow the same question to be raised again. Nor will the present case come within the scope of the remarks of Dr. Lushington in *Conway v. Beazley*, 3 Hagg. 639, as at the date of the sentence of divorce, though Mr. Dolphin had resided in Scotland for the time required by the Scotch Courts to found their jurisdiction, viz. forty days, there is nothing in the allegation to show, but the contrary, that he was a *bond fide* domiciled Scotchman. But, assuming for argument, that the deceased, when she executed the instrument of June, 1856, was a domiciled Frenchwoman, and that it is valid as her will, two further incidental points may still be raised by way of objection to the admission of this allegation. The will and codicil of 1854 were executed by her when domiciled in

1858.

January 28,
February 1 & 8,
and March 5.ROBINS AND
PAXTON
v.
DOLPHIN.

1858. England according to the English law. By sec. 20 of 7 Wm. IV. & 1 Vic. c. 26, a subsequent will, to revoke a prior one, should be executed in the manner required by that statute.

January 28,
February 1 & 8,
and March 5.

ROBINS AND
PAXTON
v.
DOLPHIN.

It is submitted, as a question for the consideration of the Court, whether the instrument of June, 1856, which was not executed according to the provisions of that statute (there being no attesting witnesses to it), is a good revocation of the prior will and codicil.

Again: The will and codicil of 1854 were made in pursuance of a power contained in the deed of the 15th of November, 1839. By that power the deceased was authorized to dispose of, or deal with, certain property by a will or codicil executed by her in the presence of two attesting witnesses. She would be entitled to revoke, by a will similarly executed, any previous will made in pursuance of that power (see *Tatnall v. Hankey*, 2 Moo. P. C. C. 342); but here an attempt is made to deal with the property, and to revoke a duly attested will by a will not duly attested. This is not a good revocation under the power.

But, II., it is submitted, that this allegation, if net altogether admissible, should be reformed. The recital of the bill in Chancery is wholly irrelevant, and the real question at issue might be stated in much more concise terms.

Dr. Deane, Q.C., and *Dr. Twiss*, Q.C., for the defendant: I. The Scotch Court had power to dissolve an English marriage under the particular circumstances of the present case. Upon principle it must have had this power. It would be absurd to say that a husband and wife, though married in England, if separated by a competent Court out of England, are not legally separated (*Connelly v. Connelly*, 2 Rob. Ecc. Rep. 258); if a sentence of separation decreed by a competent Court is effectual, so also must be a sentence of divorce *à vinculo*, when pronounced by a competent Court. The Scotch Court in this case was clearly competent to make the decree in question. It acquired jurisdiction by reason of Mr. Dolphin's residence in Scotland, which was a *bond fide* residence, and one not resorted to, as that in *Lolley's case*, for the purpose of evading the English law. It cannot be treated as a colourable residence. See Lord Truro's remarks in *Geils v. Geils*, 1 Macq. H. L. Cas. 275. Lord

Eldon, in *Tovey v. Lindsay*, 1 Dow. 117, does not appear to have considered the question decided in *Lolley's case* as concluded. When referring to it (Ib. 136), he pointed out the extreme importance of the questions raised in the case then appealed, and it was remitted to the Scotch Courts, that the House of Lords might have the benefit of the deliberate judgment of those Courts upon them; but the death of one of the parties put an end to the suit. (See also *Edmondstone's case*, Fergusson's Reports of Decisions in Actions of Divorce, 403.) What would be the position of the wife, if she were not allowed to pursue her husband in the Scotch Courts? She could not cite him in the Ecclesiastical Courts in this country, as he was out of their jurisdiction; she could only proceed against him in those Courts (the Courts in Scotland) to whose jurisdiction he was alone amenable. But, II. The decree of the Scotch Courts, if not good to dissolve an English marriage, is good to repel the presumption of law, that the domicil of the husband and wife are the same. It is good, we contend, to decide that the wife may have a separate domicil from her husband: *Williams v. Dormer*, 2 Rob. Ecc. Rep. 508. [SIR C. CRESSWELL: What force would the Ecclesiastical Courts have given to this sentence, supposing it not to be efficacious for the purpose for which it was originally intended? Is there any case, where a Scotch sentence of divorce, professing to be *à vinculo*, has been held by competent authority as good for a separation *à mensd et thoro*, in answer to a suit in England for restitution of conjugal rights?] *Connelly v. Connelly*, 2 Rob. Ecc. Rep. 201, is the nearest case to that put by your Lordship, but is not exactly in point. And, III., as to the last objection raised by Dr. Spinks, that the instrument of June, 1856, is not a good revocation under the power, it is submitted that it is not competent to the Court of Probate, any more than it was to the Prerogative Court, to deal with that question. It has jurisdiction to declare whether the instrument is testamentary or not, but not to inquire into the due execution of the power: *Barnes v. Vincent*, 5 Moo. P. C. C. 201. It was clearly the intention of the deceased to revoke all previous wills by the instrument of June, 1856, and to die wholly intestate, and that instrument is entitled to probate. See *Hughes v. Turner*, 4 Hagg. Ecc. Rep. 52, and *Brenchley v. Still and others*, 2 Rob. Ecc. Rep. 164.

1858.

January 28,
February 1 & 8,
and March 5.

ROBINS AND
PAXTON
v.
DOLPHIN.

Cur. adv. vult.

1858.
February 8.
—
ROBINS AND
PAXTON
v.
DOLPHIN.

SIR C. CRESSWELL: In this case I was to consider the admissibility of the allegation, which was opposed by Dr. Adams, on the ground that the question, which really arose, had been concluded by the decisions of other Courts. I understood from Dr. Deane, that he could reform the 7th article so as perhaps to put the question in a better form for his client. At present it merely proceeds on a recital, that Mrs. Dolphin having discovered her husband domiciled in Edinburgh, and living there in adultery, went to the place in question, and there procured a divorce. I can take no notice of an allegation in that form, as presenting any case of a real domicile in Scotland, and I shall therefore direct the allegation to be reformed in that particular, so as to allow the Court to see what is set up as a Scotch domicile. I shall do that the more, in order that I may be put in a position to judge how far the case is affected by what was said by Dr. Lushington in the case of *Conway v. Beazley* upon foreign domicils, and the effect which a permanent domicile in Scotland might have in a foreign Court.

With regard to the articles, which recite a great part of a bill in Equity, it seems to me that I ought to reject them wholly. The question to be decided by the Court is one arising out of the facts which occurred before the death of the party, and I do not see how that question could be affected or elucidated by anything that may have been done since her death by General de Pontes. I think, therefore, that those articles are irrelevant, and ought to be rejected. The seventh article I wish to be reformed, in order that I may see how far you can carry the Scotch domicile, and that I may see whether the question is concluded by the decision of Dr. Lushington.

The allegation having been reformed, its admission, as reformed, was opposed.

March 5.

SIR C. CRESSWELL (without hearing counsel) said: This case was argued before me on the admissibility of an allegation brought in by the proctor of Mr. Dolphin. The circumstances of the case are peculiar. In 1822, Mr. Dolphin, an Englishman, domiciled in England, married an English lady in England, and they afterwards lived together at his house

in Gloucestershire. In 1839, differences having arisen between them, they agreed on a separation, and afterwards lived apart.

At that time a settlement was executed, whereby certain property was secured to Mrs. Dolphin for life, with power of appointment by deed or will. In April, 1854, Mrs. Dolphin, then living in England, executed a will as required by 1 Vict. c. 26, of which Robins and Paxton were appointed executors. In the same year Mr. Dolphin went to Edinburgh, and in the same year Mrs. Dolphin also went there, and instituted against him an action for divorce before the Lords of the Court of Council and Session on the ground of adultery; and on the 20th of July a decree was pronounced, dissolving the marriage, and declaring her to be at liberty to marry again, as if he were dead; and on the 8th of October, 1854, she married, in Edinburgh, Amedee Theodore Davisies de Pontes, a Frenchman, domiciled in France; and they were afterwards remarried in France, and all necessary steps were taken to render such marriage a valid one according to the law of France. Mrs. Dolphin, having accompanied De Pontes to France, continued to live with him there as his wife, until a short time before her death, when she was placed by him in a convent in Paris, where she died. When there, Mrs. Dolphin, by the name of De Pontes, wrote and signed a paper, intended to be a will, in these words: "I revoke all foregoing wills made by me up to this date, 23rd June, 1856, Paris;" and this was alleged to be by the law of France a valid will. Mrs. Dolphin died soon afterwards, and the executors named in the will of 1854 having propounded it, the proctor of Mr. Dolphin brought in an allegation, pleading the several matters above mentioned. This was opposed on the ground that the facts alleged afforded no answer to the claim of the executors to have probate of the will of 1854, for that the Scotch Court had no power to dissolve a marriage solemnized in England, between English people domiciled in England, and consequently Mrs. Dolphin, although resident in fact in France with De Pontes, remained domiciled in England, and the document executed by her in the convent in Paris, not being attested as required by the stat. 1 Vict. c. 26, could not have any effect upon the

1858.

March 5.

ROBINS AND
PAXTON
v.
DOLPHIN.

1858.
March 5.
—
ROBINS AND
PAXTON
v.
DOLPHIN.

will executed in 1854, and the cases of *Rex v. Lolley*, Russ. & Ryan, 237, and *Conway v. Beazley*, 3 Hagg. Ecc. Rep. 639, were cited. The allegation in its then state was very vague as to the nature and duration of Mr. Dolphin's residence in Scotland before the suit for divorce was instituted, and I requested that it might be reformed, so as to enable me to judge how far the case was similar in circumstances to that of *Conway v. Beazley*. That has been done, and the allegation as to that matter now stands thus :

“ That in the month of February, 1854, but on what particular day the party proponent is unable to set forth, the said Vernon Dolphin, the then husband of the party deceased in this cause, left England and went to Scotland ; that on the 23rd of February, 1854, he arrived at Edinburgh, and from such time until the 25th of the said month he resided at the Waterloo Hotel, in Edinburgh aforesaid, when he left the said hotel, and from such time, until the 3rd of April following, he resided at a cottage, called South Cottage, which he had hired as a residence at Wardie, near Edinburgh, and that on the 3rd day of April he returned to the Waterloo Hotel, where he resided until the 9th of the said month, when he left the said hotel, and went to England for a few days, and returned to Scotland, and resided again at Edinburgh and Stirling, in Scotland, until the 6th day of June following, when he again returned and took up his said abode at the said hotel, and there remained until the 19th of the said month ; that the said Vernon Dolphin had by such residence and in intention, as well as in fact, become a domiciled Scotchman ; that the party deceased in this cause, having ascertained that the said Vernon Dolphin was living in adultery during the said time in Scotland, on the 17th of the said month of June a summons was personally served on the said Vernon Dolphin at her instance, and an action for divorce before the Lords of the Court of Council and Session in Scotland was instituted against the said Vernon Dolphin on the ground of adultery ; that on the 19th day of the said month of June the said Vernon Dolphin again went to England, but returned afterwards to Scotland, and there was resident for some days in the month of July, 1854 ; that on the 20th day of the said month of July the said Lords of the Court of Council and

Session in Scotland, by their decree, found the said Vernon Dolphin guilty of adultery, and therefore divorced and separated him from the said Mary Ann Payne or Dolphin, her fellowship and company in all time to come, and declared that he had forfeited all the rights and privileges of a lawful husband, and that the said Mary Ann Payne or Dolphin was entitled to live single or marry any free man, as if she had never been married to the said Vernon Dolphin, or as if he were naturally dead, etc.; and that by the law of England she became in like manner divorced, or, at all events, she became from the said date of the said decree divorced and separated from bed, board, and mutual cohabitation, until they, the said Vernon Dolphin and Mary Ann Payne or Dolphin, became reconciled to each other, and that at the time of the death of the said deceased in this cause, as hereinafter more particularly pleaded, they, the said Vernon Dolphin and the said deceased were not and never had been reconciled to each other, and consequently never lived together as husband and wife."

Now, the allegation does not state that Mr. Dolphin had given up his house and establishment in England, nor that he had left it without the intention of returning, nor that he had gone to Scotland with the intention of remaining there. It appears to me, therefore, that the case in this respect is governed by *Lolley's case*, and *Conway v. Beazley*, and that the marriage was not dissolved. But it was contended, secondly, that admitting that the Scotch Court had not power to dissolve the marriage, yet the sentence would have the effect of a divorce *à mens et thoro*, and that the domicile of the wife could no longer be presumed to be that of the husband, for which *Williams v. Dormer*, 2 Rob. Ecc. Rep. 505, was cited as an authority. But the sentence of the Scotch Court was no otherwise a sentence of separation from bed, board, and mutual cohabitation, than by dissolving the marriage. As a dissolution of the marriage, it cannot be recognized in this Court, and therefore, I think, could not destroy the legal presumption, that the domicile of the husband is the domicile of the wife. It follows then that the revoking instrument, not having been executed by Mrs. Dolphin in conformity with the law of her domicile, is inoperative, the will remains unrevoked, and the allegation, if admitted, would afford no answer to the

1858.

March 5.

ROBINS AND
PAXTON
v.
DOLPHIN.

1858. claim of the executors to have probate of that will. It must
March 5. therefore be rejected.

Dr. Deane, Q.C., asked the learned Judge's permission to appeal, this being an interlocutory decree (see 20 & 21 Vict. c. 77, s. 38), which was granted.

February 24 &
March 5.

HADDON v. FLADGATE (on the Admission of Defendant's Allegation).

HADDON
v.
FLADGATE.

Will.—Wife.—Husband.—Separation by Consent.—Separate Property.

A. and B. married in 1811; in 1817 they verbally agreed to separate, and not to interfere with each other, and divided their then furniture and effects. They never again cohabited, and the wife supported herself by her own industry, and acquired property, which she disposed of by will in 1856. Probate of this will was opposed by the husband, who asserted his marital right to his wife's property.

HELD, that under the circumstances, the property had been acquired to the wife's sole and separate use, and that the *jus disponendi* would therefore attach to such property.

This was a question arising on the will of a married woman under peculiar circumstances. Haddon, the plaintiff, had been sworn administrator to the effects of Martha Haddon, deceased, as her lawful husband, and it was not denied that he was her husband: but an allegation was given propounding a will of the deceased by Fladgate, one of the executors therein named, the admission of which allegation was opposed. It pleaded that from the marriage of the parties in 1811, William Haddon had uniformly treated his wife with great unkindness, which resulted, in the year 1817, in a mutual agreement to separate, to divide their furniture and effects equally, and not to interfere with any property or money which either might acquire subsequently thereto; and that Martha Haddon agreed thenceforth to maintain herself, and never to apply to William Haddon to support her or liquidate any debts which she might contract, and that in consideration thereof William Haddon agreed to permit the deceased to

enjoy her own earnings and property for her sole and separate use; that their effects and furniture were accordingly divided. William Haddon allowed deceased to have and enjoy her share thereof to her separate use; that since then deceased had entirely maintained herself by her trade of dressmaking, and had never applied to William Haddon for assistance.

1858.
February 24 &
March 5.
HADDON
v.
FLADGATE.

It further pleaded her various residences till her death; that these had never been concealed from William Haddon, who was aware that she was engaged in trade as a *feme sole*, and had saved a considerable sum of money; and that he had never in any way interfered with the deceased, but constantly down to the time of her death treated and considered such her earnings as her own, and as money set apart to her separate use, in pursuance of his aforesaid agreement. It also pleaded declarations of William Haddon in accordance with these statements, and that he had been married in fact to Ruth Bates during the lifetime of the testatrix.

That by reason of the premises, the property acquired as aforesaid by the said Martha Haddon by means of her separate trade became and was her separate property, and as such might be devised and bequeathed by the said Martha Haddon, the deceased, by her last will and testament, notwithstanding the alleged marital right of the said William Haddon. And lastly, it pleaded the *factum* of the will, dated the 30th of October, 1856.

Dr. Deane, Q.C., and *Mr. Godfrey*, for the plaintiff.

To entitle the will of a *feme covert* to probate, it must either, 1st, have been assented to by her husband after her death (*Maas v. Sheffield*, 1 Rob. Ecc. Rep. 364); or, 2ndly, it must dispose of property over which she had a right of disposition by virtue of a power for that purpose given to her; or, 3rdly, it must dispose of property held by her to her separate use. In this allegation it is not asserted, that the husband has in any way assented to the will made by his wife since her death, or that it was made in exercise of a power, and the facts pleaded are insufficient to raise a case of her being entitled to hold the property acquired by her subsequent to this separation to her separate use. To establish this last position, the circumstances of the separate trading of the wife, or of the

1848. husband and wife living separately (by agreement), are not
 February 24 & sufficient (*Lamphir v. Creed*, 8 Ves. 599), but there should be
 March 5. satisfactory evidence of a clear distinct act of the husband, by
 ——— which he totally divested himself of the property, and consti-
 HADDON tuted himself as trustee of it for the wife (*M'Lean v. Longland*,
 v. 5 Ves. 71, and *Walter v. Hodge*, 2 Swanst. 92). The allegation
 FLADGATE. does not state the nature of the property claimed to be dis-
 posed of by the will. Part of it may be leasehold. The agree-
 ment alleged to have been entered into by the husband was
 a parol agreement. But by sec. 7 of the Statute of Frauds a
 declaration of trust as to leasehold property by parol is not
 binding. It must be in writing, and therefore the agreement,
 if binding upon the husband as to chattels personal, is not
 binding as to leaseholds.

Dr. Spinks and *Mr. Ellis* for the defendant.

That a *feme covert* may by will dispose of property held
 by her to her separate use is settled law (*Hearle v. Greenbank*,
 1 Ves. Sen. 303; *Fettiplace v. George*, 1 Ves. Jun. 44; *Tap-
 pendin v. Walsh*, 1 Phill. 353), as admitted by the counsel for
 the plaintiff. The circumstances of the present case, the sepa-
 ration for nearly forty years with the husband's consent, the
 permission to the wife to trade as a *feme sole*, the fact that her
 husband never intermeddled with her property, and treated it
 as hers, and the express agreement alleged to have been en-
 tered into at the time when the separation was resolved upon,
 are amply sufficient to establish the position that we contend
 for, viz. that the property in question was held by the wife to
 her sole and separate use. In *Braham v. Burchell*, 3 Add. 263,
 Sir J. Nicholl intimated "that he had strong doubts, whether a
 will made by a married woman a dozen years after a final sepa-
 ration from her husband (through no fault of hers), disposing
 of the fruits of her industry acquired during the separation,
 could be treated as a nullity." See also *Cecil v. Juxon*, 1 Atk.
 278; *Rich v. Cockell*, 9 Ves. 380. The present case in its
 circumstances is much stronger than that of *Mews v. Mews*,
 15 Beav. 529, and the position we contend for is supported
 by *Bletson v. Sawyer*, 1 Vernon, 244, and *Slanning v. Style*, 3
 Peere Williams, 337.

But even should the right of the wife to dispose by will of

this property be questionable, the Court is still bound to grant probate (*Braham v. Burchell*, 3 Add. 264), and leave it to a Court of Equity (within whose peculiar province it is) to decide, whether the property was or was not held by her to her separate use. If probate be refused, the defendant will not be able to bring that question before a Court of Equity, as those Courts take no notice of instruments in their nature testamentary, until probate shall have been granted to them. *Rich v. Cockell*, 9 Ves. 380.

1858.
February 24 &
March 5.
——
HADDON
v.
FLADGATE.

It is therefore laid down in *Barnes v. Vincent*, 4 N. of Cas. Suppt. 25; S. C. 5 Moo. P. C. C. 200, that the safest and most convenient course in such cases is to grant probate.

Dr. Deane, Q.C., in reply: If probate is to be granted to this will on the ground last contended for by the counsel for the defendant, a will made by any *feme covert* is entitled to probate. [BY THE COURT: Is not the position put by the learned counsel on the other side, that upon a *prima facie* case being made out of a wife's right to dispose of her property by will, probate should be granted, and that that case must not be scanned very nicely?] To deal with the cases cited for the defendant: In *Tappenden v. Walsh* and *Fettiplace v. George* the property disposed of by the wife had been expressly given for her separate use. The remarks of Sir J. Nicholl in *Braham v. Burchell* were *obiter dicta*. As to *Cecil v. Juxon*, see the remarks of Mr. Jacob in 2 Bright on Husband and Wife, p. 299. In *Slanning v. Styles* the wife's savings from the butter, etc., had been treated by her husband as pin-money. And in *Mews v. Mews* it is clearly laid down, that to constitute property acquired by the wife, as acquired for her separate use, there should be some irrevocable act of the husband, and that the fact that it has been treated by him as such for a certain time is not sufficient. He submitted that the Court would not be satisfied either from the facts alleged, or upon the authorities cited, that the husband could be held in this case to have deprived himself of his marital rights.

SIR C. CRESSWELL: After a separation of forty years I shall be anxious to find authorities in favour of treating the

1858.
March 5.

testatrix as a *feme sole*, but I must take time to look at the cases cited.

Cur. adv. vult.

HADDON
v.
FLADGATE.

SIR C. CRESWELL: This was a question whether an allegation should be admitted propounding the will of Mrs. Haddon, a married woman, who had been living separate from her husband. The allegation states that the husband and wife separated many years ago, and sets up an agreement then entered into between the husband and wife to separate; to divide their furniture and effects; that the wife should work for herself and maintain and take care of herself; that the husband should not be liable for her debts; and in consideration thereof, that she should keep for her own use whatever property she obtained. It was contended, that this allegation ought not to be brought in, that there was no sufficient agreement of the property having been settled to her separate use, and that she had no power to treat it as so settled. On the other hand it was said that according to the authorities in the Court of Chancery the husband under such an agreement would become a trustee for his wife. The case principally relied upon in opposition to the admission of the allegation was *Lamphir v. Creed*, 8 Ves. 599. That was a case where Mrs. Creed, a married woman, trading without the interference of her husband, who was a soldier and residing in a different part of the country, advanced money for the purchase of a share in a lottery ticket upon an agreement with Lamphir, who was to purchase it for her, that half of the money advanced by her should be considered as a loan to him, and that they should jointly share in the adventure. That was very different in its circumstances from the present case. It is not stated that the husband in that case had agreed that the wife should trade as a *feme sole*, and have property to her separate use, and his absence from her, not wilfully, but as a soldier under the service of the Crown, did not raise such a presumption. The Master of the Rolls treated the purchase of the lottery ticket as made with the husband's own money. There are many authorities to support the right of the wife in the present case: *Cecil v. Juxon*, 1 Att. See also *Rich v. Cockell*, 9 Ves. 369, where Lord Eldon treats it as settled law, that the husband may under circumstances similar to those in the present case become a trustee for the wife.

I think that the property earned by Mrs. Haddon, since her separation from her husband, did become her separate property, and if so, all the rights incident to separate property, amongst which is the right of bequeathing it, attached. I must admit this allegation, with the exception of the article pleading the husband's bigamy, which can have no bearing on the case.

1858.
March 5.
HADDON
v.
FLADGATE.

In the Goods of ELIZABETH HOW (deceased), on Motion.

March 12.

Will.—Married Woman.—Presumed Death of Husband.

In the Goods of
ELIZABETH
HOW.

A. arrived at Albany, in the State of New York, from England, in April, 1850, and from that date, though inquiries had been made, he had never been heard of. His wife died in England in February, 1857, leaving a will dated January, 1857.

Probate granted to the executor as of the will of a widow.

In this case Elizabeth How died on the 20th February, 1857, leaving a will bearing date the 25th of January in the same year. It appeared that her husband left England for the United States, North America, in February, 1850; he was known to have arrived at New York on the 6th of April following, to have quitted the ship on the 8th of April, and to have gone by steamboat to Albany, in the State of New York, on the 9th of April; since which time nothing had been heard of him. His wife had caused inquiries to be made for him in the United States, in Australia, at the Cape of Good Hope, and elsewhere, and had caused advertisements for him to be inserted in the 'Albany Evening Journal' and the 'New York Herald' in the year 1856. Since Mrs. How's death, George Barter, the executor named in her will, had continued these inquiries, and had advertised for him in a Melbourne paper, but without hearing any tidings of him. Application for probate had been delayed till the present date, because the disposition of the property in the will was made contingent in the following words, "If my husband Edmund How does not return in twelve months after my decease."

On an affidavit of Mr. Barter to the above facts,

Dr. Deane, Q.C., moved the Court to decree probate to the

1858. executor of the will of Elizabeth How, as having died a widow.
 March 12. He submitted that the lapse of seven years since Edmund
 In the Goods of ELIZABETH How. How had been heard of would warrant the Court in granting
 probate in that form.

SIR C. CRESSWELL : I think you are entitled to have your motion granted. Seven years have fully elapsed since the husband was heard of, which is a fair ground for presuming that a person is dead, but not for presuming that he died at the beginning or at the end of the seven years.^(a) Here there is ground for supposing that this person died some time ago. If he had remained in Albany, he would probably have been known there; but not having been known, it is probable that he died very soon after his arrival there. You may fairly assume that he was dead before the date of his wife's death.

March 19. In the Goods of MATTHEW GENT (deceased), on Motion.
 In the Goods of MATTHEW GENT. *Administration Bond.—Amount.—Sureties.—20 & 21 Vict. c. 77, ss. 81, 82.*

A. died intestate, leaving his mother solely entitled in distribution, property under £3000, and debts £45. The Court granted administration on the mother entering into a bond in the amount of £100 with sureties.

Matthew Gent died in December, 1857, a bachelor and intestate, leaving his mother him surviving, the only person entitled to his personal estate. His personal property would be sworn under £3000. Mrs. Gent proposed to take out administration, but she, being a foreigner, and having no relations in England, had a difficulty in finding sureties for the administration bond. His debts did not exceed £45.

Dr. Addams, Q.C., moved the Court under the 81st and 82nd sections of the Probate Act to decree administration to Mrs. Gent, on her giving a bond with sureties in the sum of £100, or without sureties to the amount of £6000. The 82nd section directed that the administration bond should be in double the

(a) *Nepean v. Doe d. Knight*, 2 Mee. & W. 894.

amount under which the estate is sworn, unless the Court should direct the sum to be reduced; and the 81st section left it to the option of the Court to require sureties.

1858.

March 19.
In the Goods of
MATTHEW
GENT.

SIR C. CRESSWELL: The most convenient course will be for Mrs. Gent to enter into a bond in the smaller amount with sureties for double the amount of the debts said to be due, namely £100.

PATTEN v. POULTON AND OTHERS.

March 8 & 18.

Will not forthcoming at Testatrix's Death.—Presumption of Revocation rebutted.

PATTEN
v.
POULTON AND
OTHERS.

The presumption of fact, that a will, known to have been in the testatrix's custody, and not forthcoming at her death, was destroyed by her *animo revocandi*, is a *prima facie* presumption only, and may be rebutted by probable circumstances, among which declarations of unchanged affection and intention have much weight. It is not necessary for the parties seeking probate, having proved the *factum* of the original instrument and given sufficient secondary evidence of its contents, to show how the original instrument was in fact destroyed or lost.

This was a cause of proving the last will of Julia Clarenza, as contained in the draft thereof, promoted by James Patten, the executor therein named, against R. L. Poulton and Edward Poulton, the two brothers and next of kin of the deceased, and others entitled in distribution in case she died intestate.

The deceased, formerly Julia Poulton, spinster, contracted a *de facto* marriage at Gretna Green in 1806 with John Pechè, Esq., late a lieutenant-general in the Honourable East India Company's service, of which marriage were born two sons and a daughter,—of whom the two sons are now surviving, one being in Germany, and the other at the Cape of Good Hope; the daughter had married in Germany and had died since her mother's decease. It turned out that Mr. Pechè, at the time of such pretended marriage, had a lawful wife living, and on discovering this Julia Poulton separated from him, and afterwards intermarried with Count Clarenza, a Sicilian nobleman, who died in 1822, and the countess, during her after-residence in England, went by the name of Mrs. Clarenza.

1858. General Pechè died in 1823, having made the three children
 March 8 & 13. above-mentioned, who bore his name, his residuary legatees.

PATTEN
 v.
 POULTON AND
 OTHERS.

The deceased was stated to have entertained during life the warmest affection for and interest in her three children, and to have denied herself every comfort in order to forward their fortunes; and letters from her to each of them, carried down to within a few weeks of her death, were brought in in support of this statement.

In September 1837, being then resident at Blackheath, she gave instructions in a letter to James Patten, who had long acted as her solicitor and confidential adviser, to draw a will in favour of her said three children. On the 10th of October in the same year a will was executed by the deceased, dividing all her property between her three children equally, and appointing Mr. Patten executor. It was attested by two clerks in Mr. Patten's office; the draft, filled up after execution in the handwriting of one of the clerks to correspond with the will, was retained by Mr. Patten; the will itself was made over to the deceased's custody. The deceased died at Dawlish, on the 5th of September, 1846, having previously moved from Blackheath to Torquay, and from Torquay to Dawlish, and the will was not forthcoming.

The allegation propounding the draft expressly stated that the will was not destroyed by the deceased during her lifetime *animo revocandi*; that, if destroyed by her at all, it was through inadvertence and mistake, and that she died believing it to be in existence, and that it would be an operative will. It further pleaded that her brother, R. Lewis Poulton, who was living next door to her at the time of her death, had, by his own admission, burnt or otherwise destroyed some of the deceased's papers after her death as of no importance, though whether or not the said will was then destroyed was not known.

Mr. Patten, on being informed by R. L. Poulton of Mrs. Clarenza's death, and that no will could be found, expressed his astonishment thereat; various negotiations and attempts at compromise took place between the parties severally interested under the will, or in case of an intestacy, but, owing to the smallness of the property—under £1000.—and to the number of persons interested, and to their being dispersed in

various parts of the world, nothing definite was done till June, 1857, when the Judge of the Prerogative Court of Canterbury was moved to decree limited probate of the said draft to James Patten on certain proxies of consent from some of the next of kin, others entitled in distribution having been cited but not appearing, which motion the Judge of the Prerogative Court was pleased to reject; whereupon Mr. Patten propounded the draft in an allegation on which four witnesses—Mary Ann Kipps, Adolphus Bach, James Allberry, and James Patten—were examined.

1858.
March 8 & 18.
PATTEN
v.
POULTON AND
OTHERS.

Mrs. Kipps had become intimately acquainted with the deceased while residing at Blackheath. She spoke to the deceased's anxiety and affection for her children, and said that, shortly before the deceased left Blackheath to go into Devonshire, she called on the witness, and said: "My dear, I am going to London to see Mr. Patten, to settle all my affairs." On her return from London, she said: "Now I have settled all my affairs quite to my mind, and now I shall leave happy." And in February, 1844, this witness received a letter from the deceased, from Dawlish, in which she wrote: "My mind seems now at ease that the £600 is now secure in the bank for my children in case of sudden death."

Mr. Bach had known the deceased since 1830, was the agent of the deceased's children, and spoke in the strongest terms of her affection for them, and of the extreme improbability of her doing any act that would be contrary to their interests.

Mr. Allberry, clerk to Mr. Patten, spoke to the handwriting of the attesting witnesses (since deceased) to an affidavit made by them in 1847, respecting the *factum* of the will and the draft.

Mr. Patten spoke to the instruction for the will and all the circumstances of the *factum* of it, and to his retaining the draft filled up, as above stated, after execution of the will; that he corresponded with deceased till shortly before her death, and never received any intimation from her of having destroyed the will.

The cause came on for hearing on this allegation and evidence, as the next of kin had given in no allegation, and did not interrogate the witnesses.

Dr. Addams, Q.C., in support of the will: The *prima facie*

1858. presumption, that a testamentary paper, traced to the possession of the testatrix, and not forthcoming after her death, had been destroyed by her *animo revocandi*, was in this case conclusively rebutted by the circumstances,—her entire devotion to her children, and the fact that they being illegitimate would take nothing in case of intestacy. The matter had stood over for an inconvenient length of time; if that were thought to be adverse to the application for probate, it must be remembered, that the next of kin might have applied for letters of administration, and so brought the matter to an issue.

March 8 & 13. ———
PATTEN
v.
POULTON AND
OTHERS.

Dr. Twiss, Q.C., for the next of kin: The only point proved, namely, undiminished maternal affection, is not sufficient to rebut the *prima facie* presumption of revocation. The burden of proof is on the party seeking probate under such circumstances. He cited *Welsh v. Phillips*, 1 Moo. P. C. C. 299; *Wargent v. Hollens*, 4 Hagg. Ecc. Rep. 249.

By THE COURT: Have not the Courts been in the habit of admitting declarations of diminished or undiminished attachment to the parties benefited,—on the one hand, to strengthen the *prima facie* presumption; on the other, to rebut it?

Dr. Twiss: I am not aware of any case, where such declarations alone have been held sufficient to rebut the presumption.

By the COURT: Do you contend, that where a will, having been in the testator's custody, is not forthcoming, the presumption can only be rebutted by proving some mode by which it might actually be destroyed? Can the Court not take into consideration several probabilities, not perhaps fortifying each other, but each suggesting a more or less probable account of the matter? As here you have—first, the statements as to continued affection; secondly, the probability of the paper having been destroyed by mistake; thirdly, of its having been lost in the changes of residence.

Dr. Twiss: There is no statement or allusion on her part to testacy or intestacy.

BY THE COURT: But she knew that the children could take nothing under an intestacy, and she stated some time before her death that she was satisfied in the thought that her small property would go to them.

1858.
March 8 & 13.
PATTEN
v.
POULTON AND
OTHERS.

Dr. Addams: Davis v. Davis (2 Add. 226) was a case which turned on probabilities and undiminished attachment, and Sir John Nicholl there said, "The presumption may be repelled, nor does it require evidence amounting to positive certainty, but only such as reasonably produces moral conviction."

BY THE COURT: So that in such cases the maxim, *Stabitur presumptio donec probetur in contrarium*, does not, in its strictness, hold good?
Cur. adv. vult.

SIR C. CRESSWELL: This is a cause of propounding the will of Julia Clarenza, deceased, promoted by James Patten, the executor therein named, against R. L. Poulton, her eldest brother and others, next of kin. Several witnesses were examined on Patten's allegation; the next of kin did not bring in any allegation or administer any interrogatories. The following facts are proved: Julia Clarenza, formerly Poulton, in 1806 married John Pechè, and by him had three children, two sons and a daughter; she then discovered that before the marriage Pechè was married to another woman, who was still living, and thereupon immediately separated from him, and never cohabited with him again. She afterwards married Count Clarenza, who died in 1822, and by him had no issue. John Pechè died in 1823, having made a will in favour of his three children above-mentioned, his property being sworn under £3000. Julia Clarenza was always devotedly attached to her children, who grew up under her care. The daughter married an Austrian, one son entered the Austrian army, and the other settled at the Cape, and she maintained a correspondence with them during the whole of her life, always manifesting the strongest affection for them, and anxiety for their prosperity. After Count Clarenza's death she lived at Blackheath, in Kent, and when there, often spoke to a lady with whom she was intimate, of her anxiety about them, and

March 13.

1858.
 March 18.
 PATTEN
 v.
 POULTON AND
 OTHERS.

of her intention to settle her affairs, so that they might enjoy the small property of which she had to dispose. In 1837 she was about to remove to Torquay, and then gave instructions in her own handwriting to Mr. Patten, a solicitor, for the preparation of a will. He prepared one according to those instructions, and, at her request, consented to act as executor. The will was executed on the 10th of October, 1857, and at the same time the attestation clause and the names of the attesting witnesses were copied on to the draft, which Mr. Patten retained, the will being given to the deceased. She afterwards told a Mrs. Kipps, an intimate friend resident at Blackheath, that she had settled her affairs; and in 1844, writing to the same lady, said, "My mind seems now at ease, that the £600 is now secure in the bank for my children in case of sudden death." In October, 1837, the deceased removed to Torquay, and remained there for some time occupying part of the house in which her brother R. L. Poulton resided. She afterwards removed to Dawlish, and there occupied part of a small cottage till her death, which happened in September, 1846. Her brother thereupon went to Dawlish and searched for a will without success; when so doing he burnt some papers, which appeared to him unimportant, and it was not imputed that he had intentionally destroyed a will. The delay that has occurred in propounding the will having been accounted for, I make no observation respecting it. The case, then, stands thus: the executor has proved the due execution of a will, and that the original cannot be found, and he has given satisfactory secondary evidence of the contents. But, on the other hand, it is said that, as the will was in the keeping of the deceased, and at her death could not be found, it must be presumed that she destroyed it *animo revocandi*. This has sometimes been called a presumption of law; but I think that Sir J. Nicholl, in *Colvin v. Fraser* (2 Hagg. 325), and Parke, B., in *Welsh v. Phillips* (1 Moo. P. C. C. 302), more correctly designate it a presumption of fact, and there can be no doubt, that evidence of a will being left in the keeping of the party who made it, and that it cannot be found at his death, is sufficient, in the absence of circumstances tending to a contrary conclusion, to warrant an opinion that the maker of the will destroyed it. But it is

a presumption that prevails only in the absence of circumstances to rebut it, and is, therefore, commonly called a *prima facie* presumption. It may be fortified or it may be rebutted by many circumstances. Those commonly relied on are declarations either of goodwill towards the parties benefited by the will, and of an adherence to the will as made, or, on the contrary, of dissatisfaction and change of mind respecting them. In *Saunders v. Saunders* (6 N. C. 522) Sir H. Jenner Fust said, "The strongest proof of adherence to the will, and of the improbability of its destruction, arises from the contents of the will itself." In the present case I find no extraneous circumstances to fortify and support the *prima facie* presumption; the lady changed her residence twice after the will was made, and she does not appear to have had any place for the deposit and safe custody of papers of importance: the probability of the will being lost by accident is not therefore excluded. Again, her brother destroyed some papers, the particular nature of which is not ascertained. It is not suggested that he wilfully destroyed a will, nor is it probable that he could destroy the will in question, which would be of considerable bulk, without some examination; but the possibility of its being so destroyed is not excluded. On the other hand there are many circumstances tending to negative the presumption: the constant undeviating affection manifested by the deceased for her children,—that the will was made under the influence of that feeling as expressed at the time and afterwards,—that she never expressed a desire to benefit by her will any other person, and above all, the fact that she perfectly well knew that her children were illegitimate (although not by any fault of hers), and that consequently, if she died intestate, they would receive no part of her property, but the whole would be divided amongst others. Here then, as in *Saunders v. Saunders*, it may be said, that the contents of the will itself show the improbability of its destruction. These circumstances combined render it so improbable that the deceased would wilfully destroy a will made in favour of her children, that I cannot, from the mere circumstances of its not being found, presume that she did so. The will then having been duly executed, the contents of it having been duly proved by secondary evidence, and it not being established that the deceased revoked

1858.

March 13.

PATTEN

v.

POULTON AND
OTHERS.

1858. that will, the Court must give effect to it by pronouncing for its force and validity, and by decreeing probate of the draft.
 ———
 March 13.

Dr. Twiss applied for costs out of the estate.

SIR C. CRESSWELL: I have considered the question of costs, and shall make no order as to them.

March 19. In the Goods of MARY SHAW, Spinster (deceased), on Motion.

In the Goods of
 MARY SHAW.

Will.—Codicils.—Presumptive Revocation.

A. made her will in March, 1854, and a codicil in June, 1854, one of the legatees under the will having died since its execution. In May, 1856, she executed another codicil, among other things appointing one of the parties benefited under the codicil of 1854, to be executor, in the room of one appointed in the will. At her death, in December, 1857, the will and second codicil were found in a tin box at the Bank of England, in which she kept her papers; but the first codicil, of which the testatrix took possession immediately after its execution, was nowhere to be found.

On motion for probate of the draft of the first codicil, with the consent of the residuary legatees:

HELD, That the *prima facie* presumption of revocation was strengthened, rather than rebutted by the circumstances.

Probate of the draft refused.

This deceased died on the 13th of December, 1857, leaving a will, dated the 13th of March, 1854, in which H. K. Smithers, James Ford, and Alexander Christie, were appointed executors and trustees, Miss Lucy Chambers and Miss H. M. Smith, residuary legatees.

On the 26th of June, 1854, the deceased executed a codicil, which at her death was not forthcoming, but the draft of it was in existence. This codicil disposed of £500, and the reversion of another sum of £500, which by the will had been bequeathed to James Christie, who died in Upper Canada in April, 1854. George and Charlotte Christie, and their children, were the persons benefited under the first codicil.

On the 27th of May, 1856, the deceased executed another codicil, by which she revoked the appointment of Alexander Christie, one of the executors in her will, and appointed George Christie, who was benefited by the first codicil, executor of her

will and codicils thereto, and trustee with Smithers and Ford of the trusts thereby created. This second codicil revoked certain pecuniary legacies contained in the will and bequeathed others.

1858.

March 19.

In the Goods of
MARY SHAW.

Mr. Smithers, one of the executors and trustees, was the intimate friend of the deceased, and consulted by her on all business matters, and drew and wrote the will and both codicils. The first codicil was executed at Mr. Smithers' house, and was taken away by the testatrix, who kept papers of consequence in a tin box deposited at the Bank of England, in which, after her death, the will and codicil of 1856 were found, but the first codicil was not forthcoming, either there or in any repositories at her residence. Advertisements had been inserted offering a reward for it, but without producing any information.

Dr. Deane, Q.C., moved the Court, to grant probate of the draft of the codicil of 1854, limited until the original codicil, or a more authentic copy, should be brought into the registry. The consent of the residuary legatees, who would be prejudiced by the draft forming part of the probate, had been obtained to the present motion.

SIR C. CRESSWELL: Has it been usual to be satisfied with consent in such cases? It is in evidence that the deceased had a place for the deposit of papers of importance; the codicil in question was in her possession, and must have found its way there. I should have great difficulty in saying that the presumption of revocation is rebutted; in point of fact, the presumption is fortified by the circumstance of the will and second codicil being found where she usually placed papers of importance, and the first codicil not being there. The deceased must have had access to that place, and should have known that it was not there. The party relies on the circumstance of the deceased having spoken of her will and codicils; but the second codicil is a very long one,—in it she alludes frequently to the will, but never to the former codicil. I must reject this motion.

1858. In the Goods of SARAH HANNAH ROBERTS, Spinster (deceased),
March 26. on Motion.

In the Goods of
SARAH HAN-
NAH ROBERTS.

Administration.—20 & 21 Vict. c. 77, s. 73.

A. died intestate, leaving an aged uncle and aunt, the only persons entitled in distribution; at their desire administration was granted for their use and benefit to their son on the sureties justifying.

Sarah Hannah Roberts died on the 5th of January, 1858, intestate, a spinster, without parent, brother, or sister, leaving William Roberts, her lawful uncle by the father's side, and his wife Hannah Roberts, her lawful aunt by the mother's side, the only next of kin, and solely entitled in distribution. Mr. and Mrs. Roberts being of very advanced age, were unwilling to take upon themselves the burden of administration, and were desirous that letters of administration should be granted to their son for their use and benefit. On an affidavit from Mr. and Mrs. Roberts,

Dr. Phillimore, Q.C., moved the Court accordingly. He submitted that this was a case in which the Court would be inclined to exercise the discretion given to it by 20 & 21 Vict. c. 77, s. 73.

SIR C. CRESSWELL: I grant this motion; but the sureties must justify.

In the Goods of
MARY BUR-
RELL.

In the Goods of MARY BURRELL, Spinster (deceased),
on Motion.

Administration.—20 & 21 Vict. c. 77, s. 73.

A. died intestate, leaving her only sister solely entitled in distribution, a lunatic, and without any committee of her estate or person. Administration for the use and benefit of the sister during her lunacy granted to the stepmother, who was co-executor and co-trustee with the deceased of the father's will, and beneficially interested under it. Surviving cousins not cited.

The deceased in this case died in November, 1857, a spinster, without a parent, and intestate, leaving Frances Burrell,

spinster, her sister, her only next of kin and solely entitled in distribution; the personal property was about £2000. Frances Burrell, aged about fifty-two years, had been for many years a lunatic, and confined in a private lunatic asylum, without prospect of recovery, but no committee of her person or estate had been appointed. Mr. Burrell, the father of the two sisters, by his will bequeathed his estate and effects, in moieties, to his wife Sarah Burrell, the stepmother of Mary and Frances, and to his daughter Mary, and appointed them trustees and executrixes; they proved this will in November, 1853. Mr. Burrell in his said will declared "that he made this provision for his said wife and daughter in the full and implicit confidence that they would thereout maintain and provide for his daughter Frances Burrell during her life, yet so nevertheless that the same provision should not be a charge upon or in any manner affect the disposition thereinbefore made." Mary Burrell and Sarah Burrell had, since Mr. Burrell's death, provided for the lunatic, whose only next of kin at her sister's death were several cousins, with whom her father and sister had had very little communication.

On the affidavit of Sarah Burrell, of the nurse and of the medical attendant at the lunatic asylum, and on a copy of Mr. Burrell's will,

Dr. Phillimore, Q. C., moved the Court for letters of administration of the effects of Mary Burrell to be granted to Sarah Burrell, for the use and benefit of the said Frances Burrell during her lunacy. This case would come under the 73rd section of the Probate Act, and there was some authority for it in cases under the old jurisdiction. (*In the Goods of Mary Keane*, 1 Hagg. Ecc. Rep. 692; *In the Goods of Agnes Blagrove*, 2 Hagg. Ecc. Rep. 83.)

SIR C. CRESSWELL: What was done as to the sureties in those cases? I am told that the usual course in similar cases is for the sureties to justify, in which case the motion may be granted as prayed.

1858.

March 26.

In the Goods of
MARY BUR-
RELL.

1858.

March 19.

In the Goods of
ROBERT
COOPER.

In the Goods of ROBERT COOPER (deceased), on Motion.

20 & 21 *Vict. c. 87, s. 88.*

Probate of the will of R. C. had been granted by the Peculiar Court of W. to his executor R. S. C. who was now abroad, and supposed to be in Australia. R. C. at the time of his death had assets out of the jurisdiction of the Peculiar of W.

A motion to grant letters of administration with the will annexed under section 88 of the Probate Act to the residuary legatee of R. C. refused.

SEMPLE, that on the Court being satisfied that the executor of R. C. was in a distant country, it would grant administration to his residuary legatee.

Robert Cooper, late of Bilston, in the county of Stafford, died in April, 1826, leaving a will in which Ann Cooper, R. Thompson, and his son R. S. Cooper, were named executors, the first two being residuary legatees in trust.

In January, 1827, Ann Cooper proved his will in the Royal Peculiar of Wolverhampton, power being reserved of granting probate to Richard S. Cooper, R. Thompson having renounced probate.

In 1841 Ann Cooper, who had subsequently married, died, and probate of the will was granted by the same Court to R. S. Cooper, who left the kingdom in August last, and was still abroad.

At the time of the death of the testator, E. F., who was then resident out of the jurisdiction of the Peculiar of Wolverhampton, was indebted to him in the sum of £132. 4s.

E. F. subsequently became insolvent, and made an assignment of his property to trustees for the benefit of his creditors, who were now prepared to pay to the estate of the deceased £72. 14s. 2d. by way of a dividend on the above debt.

Dr. Addams, Q.C.: At the time of the testator's death, E. F. being resident out of the jurisdiction of the Peculiar of Wolverhampton, his debt would not pass under the probate of the Court of that Peculiar. No probate had been taken out of the Diocesan or Prerogative Court. He moved the Court, under the 88th section of the Probate Act, to decree administration (with the will annexed) of the effects of the

deceased, limited to the purpose of receiving and administering the said dividend, to J. R. Cooper, the son of the deceased, and one of the residuary legatees named in his will.

1858.

March 19.

In the Goods of
ROBERT
COOPER.

SIR C. CRESSWELL: The 88th section would be precisely in point for granting a new probate to the executor limited to the property out of the jurisdiction of the Court which made the original grant. But this is not what you are asking for. You want an administration with the will annexed to be granted, not to the executor, who is abroad, and who proved the will, but to one of the residuary legatees.

Dr. Addams: The motion, perhaps, might be granted under 38 Geo. III., c. 87. and sec. 74 of the Probate Act.

SIR C. CRESSWELL: The 74th section is applicable to cases where letters of administration have been granted, and the provisions of 38 Geo. III. c. 87, to which it refers, are limited by the form of affidavit there prescribed, which is to the effect, that the applicant is a creditor of the deceased's estate, and is desirous of exhibiting a bill in Equity. That Act does not apply to this particular case, but only to a case where the person making the application is desirous of exhibiting a bill in Equity. The powers of that Act are extended by section 74 of the Probate Act, but only to cases where letters of administration have been granted. But here probate and not letters of administration have been granted. It does not appear where the executor is; he may be close at hand; you had better find him out, and get him to take or renounce the grant, or perhaps if it can be shown that he has gone to a distant country, as, for example, India or Australia, there might be no difficulty in granting the motion.

Dr. Addams: From a letter, it appears that the executor is supposed to be in Australia.

SIR C. CRESSWELL: I should like to have an affidavit of that fact, and then probably I should grant the application.

1858. In the Goods of JOHN PETER RIPLEY (deceased), on Motion.
March 19 & 26.

Will.—Copy.—Evidence of Execution.

In the Goods of
JOHN PETER
RIPLEY.

A. being resident in India, sent in 1850 to England, in a letter to his solicitor, a copy of a will which he stated he had made there. In February 1857 he transmitted in the same way a copy of a codicil stated by him to have been made at Delhi. A. lost his life in May 1857 in the mutiny at Delhi, and the will and codicil were not forthcoming. On motion for probate of the will and codicil as contained in the copies sent to England:

Held, that there being no proof of the execution of the original will and codicil except the statement of the deceased himself, made after their execution, the copies were not entitled to probate.

This was a question of proving the will and codicil of the deceased, who was killed in May 1857, being then the colonel commanding the 54th Bengal N. I., as contained in copies sent by post to his brother, W. R. Ripley, of Lincoln's Inn Fields. Mr. W. R. Ripley's affidavit, on which the motion was founded, established the following facts: he had always acted as Colonel Ripley's legal adviser, and in the year 1850 he received by post from India a copy of a will dated the 2nd of March, 1850, with an attestation clause, but no copies of the signature either of the testator or of the subscribing witnesses. On the same paper was a letter from Colonel Ripley to his brother, referring to the will, desiring him, if he was not satisfied with it, to send him the draft of one properly expressed, and at all events to destroy a former will then in Mr. W. R. Ripley's custody. Mr. W. R. Ripley accordingly destroyed the old will, but did not send out any new draft, being satisfied with the one of which he had just received the copy. In April 1857 Mr. W. R. Ripley received in the same manner the copy of a codicil headed, "Codicil No. 1 to my will written at Delhi, 18th February, 1857." The copy of the codicil bore the signature J. P. Ripley, Lieutenant-Colonel, Bengal army. Witnesses: H. C. Henderson, Lieutenant, 54th Regiment N. I.; Ernest Edwards, Lieutenant, 54th Regiment N. I. The letter accompanying this codicil referred to the will of 1850, the copy of which Colonel Ripley presumed his brother still retained.

It seemed probable that Colonel Ripley, after he was wounded, had time to make over his papers of importance to a

native servant, and that the will and codicil would be amongst them. One of his sons in India had made every exertion to recover them, but without success. Lieutenant Edwards was killed at the same time with Colonel Ripley; Lieutenant Henderson was supposed to be alive.

1858.

March 19 & 26.

In the Goods of
JOHN PETER
RIPLEY.

Dr. Deane, Q.C., moved the Court to decree probate of the will and codicil as contained in the copies transmitted by Colonel Ripley to his brother, to the executors therein named.

SIR C. CRESSWELL: There is abundant proof of the contents of the will and codicil, but I have a great difficulty as regards the proof of execution of these papers. The only proof before me is the statement and assertion of the deceased himself. Is there any precedent for granting probate of papers, where there was no other proof of the execution of them?

Dr. Deane: I have not been able to find any exact precedent; but where, as in the codicil now before the Court, a testamentary paper purported to bear the names of two subscribed witnesses and the attestation clause was defective, the Prerogative Court did not always insist upon affidavits from such witnesses if they were at a great distance, in India for instance.

BY THE COURT: But in such cases the original instruments were produced. Here I have before me mere copies, and nothing besides the deceased's own statement that the originals were executed. I do not see where it would stop if I am to grant probate of these: the motion must stand over.

SIR C. CRESSWELL: This was an application for probate of a supposed will and codicil (the alleged testator having been murdered at Delhi) as contained in what were said to be copies of the will and codicil sent over to this country. It seemed to me at the time when the application was made, that I could not grant it upon principle, there being no proof of the *factum* of the original will and codicil except the decla-

March 26.

1858. rations of the supposed testator, made after their execution,
March 19 & 26. that he had made such a will and codicil. But as the circum-
stances of the case caused me to feel rather disposed to grant
probate of the instruments, if I could do so with propriety,
I was anxious to have an opportunity of seeing whether any
instance could be found, in which the Prerogative Court had
granted probate under similar circumstances. No instance
could be found; but in the case of *Doe d. Shallcross v. Palmer*, 16 Q. B. 747, a Common Law Court refused to receive in evidence the declaration of a testator, made after the execution of his will, that an interlineation in it was made before execution. If a declaration made after execution as to an interlineation could not be received, *à fortiori* a declaration as to the actual making of a will could not be received. There being no other evidence as to the *factum* of the will, I am bound to refuse probate of the copy. I must reject the motion.

—
In the Goods of
JOHN PETER
RIPLEY.

C A S E S
IN THE
COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

BEFORE THE JUDGE ORDINARY.

Ex parte ARMITAGE.

*Divorce.—Practice.—Action of Crim. Con.—Adulterer.—
Co-Respondent.*

1858.

January 23.

Ex parte
ARMITAGE.

A. having, in an action of crim. con., recovered damages against B., applied for leave to present a petition for the dissolution of his marriage without making B. a co-respondent to such petition.

Held, that the circumstance of A. having recovered damages against B. did not constitute such special ground, within the meaning of 20 & 21 Vict. c. 85, s. 28, as to justify the Court to grant the application.

This was an application made under the 28th sect. of 20 & 21 Vict. c. 85, which provides that “upon any such petition “presented by a husband” (for the dissolution of marriage on the ground of his wife’s adultery), “the petitioner shall make “the alleged adulterer a co-respondent to the said petition, unless on special ground, to be allowed by the Court, he shall “be excused from so doing.”

Mr. Pulein, on behalf of a husband, applied for leave to present such a petition without making the alleged adulterer a co-respondent, on the special ground that the husband had already recovered damages and costs against him in an action of crim. con.

THE JUDGE ORDINARY: I cannot grant you any authority to present a petition without doing what the statute re-

1858.
January 23.

quires, unless upon special grounds shown. You have not shown any special grounds in this case, and I must therefore reject your application.

February 8.

SAUNDERS
v.
SAUNDERS.

SAUNDERS v. SAUNDERS.

Wife.—Divorce à mensâ et thoro.—Application to reduce permanent Alimony.

A. obtained a sentence of divorce *à mensâ et thoro*, in 1847, by reason of her husband's cruelty. £300 per annum was taken by consent as permanent alimony. Upon her father's death, A. having received an accession of income (to the extent of £144 per annum, as admitted by herself), her husband applied for a reduction of alimony.

Held, that no case was made out by the husband for a reduction of alimony. His income did not appear, and *non constat* that £300 would not have been originally allotted by the Court, even if A. had then been in possession of £144 per annum.

This was an application to the Court for a reduction of permanent alimony. The marriage took place in 1825. In 1847, Mrs. Saunders obtained a sentence of divorce *à mensâ et thoro* in the Consistory Court of London,¹ by reason of her husband's cruelty. Permanent alimony was taken by consent of both proctors at £300 per annum. There were four children of the marriage, sons, now making their own way in the world, and who, as alleged by Mr. Saunders, had been educated at his sole expense, whilst Mrs. Saunders asserted that she had expended considerable sums and had incurred a debt of £750 in respect of the youngest son's education, and for the advancement of the others.

Mrs. Saunders' father died in December, 1855. Some time after this event Mr. Saunders, conceiving that his wife had in consequence of her father's death become possessed of an independent income, allowed the payment of alimony to fall in arrear.

Monitions to enforce payment were served on Mr. Saunders in the spring of last year, and on the 2nd of July the Judge of the Consistory Court of London ordered immediate payment of two quarters' alimony, due up to the 18th of March, 1857.

¹ 1 Rob. Ecc. Rep. 555.

Mr. Saunders then brought in an allegation, pleading Mrs. Saunders' separate income to be £500, £400, or at least £300 per annum; and in an additional article to the allegation asserted that she had other independent income under the testamentary disposition of a deceased relative.

1858.
February 8.
SAUNDERS
v.
SAUNDERS.

Mrs. Saunders' personal answers to the allegation admitted an income of £144 per annum, under her father's estate, with the possibility of some increase to it. Mr. Saunders was examined on the allegation, but his evidence was little more than hearsay.

Dr. Phillimore, Q.C., and *Dr. Spinks*, in support of Mr. Saunders' application.

Dr. Addams, Q.C., and *Dr. Robertson*, *contrà*, for Mrs. Saunders.

THE JUDGE ORDINARY: I am of opinion that no sufficient case is made out to induce me to order a reduction of alimony. A husband separated from his wife for cruelty does not present himself under very favourable circumstances to the Court. It does not appear that, latterly at least, the sum decreed by the Consistory Court of London was paid, except by compulsory proceedings in that Court. I have no means of knowing upon what computation the alimony was originally settled, or what the husband's income now is. The original alimony was taken by consent, and it is not likely under such circumstances that a husband would act very liberally towards a wife. There are no facts before me to show that this alimony would be unreasonable according to the husband's present income taking into consideration the income which the wife admits she now receives from her father's estate. I must reject this application with costs.

ROWBOTHAM v. ROWBOTHAM.

Petition for Dissolution of Marriage.—Service of Citation.—Practice.

February 17.
ROWBOTHAM
v.
ROWBOTHAM.

On motion to allow substitutional service on the father of a husband proceeded against for adultery and bigamy, it appearing most pro-

1858.
February 17.

ROWBOTHAM
v.
ROWBOTHAM.

bable that the husband was in New York, the Judge Ordinary refused to dispense with personal service.

QUERRE. Whether the Judge Ordinary has power to dispense with personal service in a suit for dissolution of marriage?

This was a motion to dispense with personal service of a citation, and to allow a substitutional service under 20 & 21 Vict. c. 85, s. 42, and rule 10 of the Court for Divorce and Matrimonial Causes. The suit was instituted by the wife for a dissolution of marriage by reason of the husband's adultery and bigamy. The parties were married in November, 1849, and the delinquency, which formed the ground of the petition, was stated to have occurred in March, 1856. From the affidavits of the wife and her brothers, to whom Mr. Rowbotham had written since that date, it was most probable that he was in New York, and had gone from England to that city in the year 1856. Mr. Rowbotham's father admitted to one of the brothers, that he could send a letter which would reach his son, but seemed unwilling to communicate his direct address, even if he knew it.

Mr. Macqueen, moved the Court to permit a substitutional service on the father of Mr. Rowbotham, allowing him ample time to communicate with his son, and then, if no appearance were given, to proceed with the cause. On the practice of the House of Lords in such cases, he cited *Mrs. Battersby's case*, session 1840,¹ where the husband having been convicted of bigamy and transported, substitutional service on the attorney, who had been employed to defend him at the Old Bailey, was permitted; and the House did not suspend its proceedings, but the bill went on in its usual course.

THE JUDGE ORDINARY: What would have been the fate of a bill if directions had been given to serve a party abroad with notice of the second reading, and the result of such direction could not be known till after the end of the session? The answer to that question may throw light on *Mrs. Battersby's case*; there too the conviction of bigamy may have been considered as affecting the husband with notice that his conduct was impugned

¹ *Macqueen's 'Practice of the House of Lords,'* p. 667.

Mr. Macqueen: In *Captain Wyndham's case*, session 1855,¹ the petitioner was allowed, under such circumstances, to continue his bill in the next session of Parliament.

1858.
February 17.

ROWBOTHAM
v.
ROWBOTHAM.

THE JUDGE ORDINARY: The main question is, whether you have shown a practical impossibility of serving the husband. Upon looking at the Act I feel some doubt,—however, the rule 10 is in general terms,—whether, sitting as Judge Ordinary, I have power to dispense with personal service in proceedings for dissolution of marriage; and if I have the power, I am of opinion that some further steps should be taken, than appear to have been taken on these affidavits. I feel great difficulty about it. I should be glad to render parties all due assistance. But there is strong evidence that the husband is in New York, and some effort might be made to discover him. If I were at once to say that service on the father is good service, it might lead in a majority of cases to dispensing altogether with personal service. I should recommend a copy of the citation to be sent out to New York, with directions to endeavour to discover his residence there and to serve it upon him. An affidavit should be made before a person competent to administer oaths in America of the service of the citation or stating that he cannot be found in New York. An alteration must be made in the form of citation, as given in the rules and forms, for that is clearly only applicable to service in England, as it commands an appearance within eight days of the service. In the citation to be sent out, I should advise the appearance to be commanded within six weeks after the service.

CURTIS v. CURTIS, on Motion.

Petition for Judicial Separation.—Custody of Children under Sect. 35 of Divorce Act.—Interim Order.

February 24.

CURTIS
v.
CURTIS.

This was a question arising out of a suit for judicial separation, brought by Mrs. Curtis against her husband for cruelty, as to the custody of the children *pendente lite*, under sect. 35 of 20 & 21 Vict. c. 85.

It appeared that the marriage of the parties to the suit took

¹ 3 Macq. H. L. Cas. 43.

1858.
February 24.
CURTIS
v.
CURTIS.

place in June, 1846,—and that of the marriage there had been five children born, of whom three were surviving, of the respective ages of nine, eight, and five years. Mr. and Mrs. Curtis resided in London some time after their marriage, and the affidavit of the wife in support of the present motion set forth certain acts of violence on the part of Mr. Curtis to the children and herself. It was stated that in the autumn of 1850 Mr. Curtis had been put under restraint as a lunatic, and that when such restraint became no longer necessary he was desirous of going to Australia, on which point differences arose between himself and his wife, and threats on his part were sworn to of going to Australia with the children, leaving Mrs. Curtis to shift for herself. Ultimately they went together to New York in February, 1852; in the course of which year the husband was again placed under restraint as a lunatic. The father of Mrs. Curtis went over to New York and brought her and the children back to England, and from that time till 1857 it was stated that the husband had deserted, or at least never returned to the wife, or in any way contributed to her maintenance or to that of the children. In July, 1857, he found Mrs. Curtis living with her father in Ireland. Mrs. Curtis, wishing to avoid him, escaped with her children, and had since been living under an assumed name. In February, 1858, the husband again found Mrs. Curtis living with her sister at Hornsey, and attempted, as she asserted, to take from her by force the youngest child. The elder children were, at the date of the present application, under the care of an old governess of the family, and at the expense of Mrs. Curtis's father.

Under these circumstances,

Mr. Forsyth, Q.C., moved the Court to make an order that while the suit was pending, and till some final order should be made, the children should be protected from the father's violence, and that he should be restrained from removing them from the mother's custody.

Mr. Curtis appeared in person in opposition to this motion, and explained according to his own view the specific acts of violence towards the children alleged by Mrs. Curtis; said that his being under restraint was merely the temporary effect of

brain fever, and contended that on Mrs. Curtis's own affidavit there was no such conduct on his part as could justify his being deprived of his common law right to the custody of the children; he concluded by praying the Court to make an interim order, that Mrs. Curtis be restrained from exercising her unlawful custody of the children, be ordered to bring them into Court and deliver them over to the custody of himself as their father and lawful guardian.

1858.
February 24.

—
CURTIS
v.
CURTIS

THE JUDGE ORDINARY: All that I can now do is to make an interim order, which can have no bearing whatever on the merits of the case as between the principal parties, which I do not wish in any degree to enter upon and prejudice now. For the present purpose the two elder children seem to be in very proper custody with the lady in whose care they now are, and on the understanding that Mrs. Curtis's father remains responsible for their expense, I desire that they should continue in that custody till further orders; the youngest child, five years of age, must remain with the mother. In both cases the father is to have reasonable access, and no change of their residence is to be made without giving the father notice.

Ex parte MULLINEUX.

February 27.

Desertion.—Protection Order.—Specific Property.

—
Ex parte MULLINEUX.

A protection order under sec. 21 of the Divorce Act should be in general terms, the Court having no power to decide what title the wife may have to specific property.

This was an application on behalf of Mary Mullineux under the 21st section of the Divorce Act, for an order to protect her property.

From her affidavit it appeared that she was married in August, 1836, to James Mullineux; that she lived and cohabited with him at Market Drayton for nearly a year and six months; that in February, 1838, he deserted her without any reasonable cause; that from that time she had no intelligence of her husband till August, 1848, when she received a

1858. letter from him, dated "Pittsburgh, Pennsylvania, 18th June,
 February 27. 1848;" that in January, 1854 he unexpectedly came into her
 house and stopped there a short time; that he then went to
 the house of his father at Market Drayton, where he remained
 about a fortnight, making almost daily calls upon her, but not
 cohabiting; that he then suddenly left the neighbourhood, and
 that the last tidings she had received of him were contained
 in a letter he had written to her, dated "Liverpool, 10th
 February, 1854," in which he stated his intention of forth-
 with sailing for America; that since the desertion of her hus-
 band she had maintained herself by her own industry, and
 had thereby and otherwise acquired certain property, consist-
 ing of—[here the description of various houses in the appli-
 cant's possession or occupation were set forth, and other pro-
 perty earned and acquired, see form 13.]

Ex parte MUL-
 LINEUX.

Dr. Addams, Q.C., moved the Court for an order of protec-
 tion under the 21st section of the Divorce Act, as to the speci-
 fied property, against the husband, his creditors, and all per-
 sons claiming under him.

THE JUDGE ORDINARY: On this affidavit *Mrs. Mullineux*
 is certainly entitled to an order for the protection of her pro-
 perty, but my order cannot specify the particular property to
 which it is to extend. I have no power to decide the title to
 any property. The order must be in general terms, leaving
 untouched all questions as to right to this or that particular
 property.

February 27.

EVANS v. EVANS, on Motion.

EVANS
 v.
 EVANS.

*Petition for Dissolution of Marriage.—Practice.—Style of
 Court.—Answer to Petition.*

A petition for dissolution of marriage should be addressed "To the
 Court for Divorce and Matrimonial Causes."

Where the petition on the face of it sets up a sufficient case it should
 be met by a responsive plea, and cannot be dismissed by the Court
 on an affidavit of facts, which might be a sufficient plea in bar.

In this case Mr. Evans had presented a petition for dissolution of marriage by reason of Mrs. Evans' adultery, addressed "To the Judge Ordinary of Her Majesty's Court for Divorce and Matrimonial Causes."

1858.
February 27.
EVANS
v.
EVANS.

The facts, which this petition set forth, were the same as those on which Mr. Evans had founded a suit for divorce *à mensâ et thoro* in the Arches Court of Canterbury, which had terminated in June, 1857, by the learned Dean of the Arches pronouncing that Mr. Evans had failed in proof of the libel given in by him, and dismissing Mrs. Evans from the suit. This, of course, did not appear on the face of Mr. Evans' petition to the Court for Divorce and Matrimonial Causes.

THE QUEEN'S ADVOCATE (*Sir J. D. Harding*): In this case I appear for the respondent, the wife proceeded against; the petition given in by Mr. Evans is addressed, following the form, No. 3: "To the Judge Ordinary of the Court for Divorce and Matrimonial Causes." I do not feel certain on the point, but presume an answer may be correctly addressed in the same way. I also hold in my hand a motion, supported on Mrs. Evans' affidavit, that your Lordship would be pleased to dismiss this petition on the ground that it is *res judicata* by a Court of competent authority; but I apprehend that, as nothing to that effect appears on the face of the petition, we must answer that petition, and are not yet in a position to ask that it should be rejected.

THE JUDGE ORDINARY: I am not at all sure that the petition is rightly addressed; the forms were not intended to be literally followed, but merely to serve as general examples, and the full Court alone has the power to hear petitions for dissolution. The better course will be that the petitioner should have leave to amend his petition, and address it "To the Court for Divorce and Matrimonial Causes." As to the second point you mentioned, I am clearly of opinion that you are not, under the circumstances, at liberty to ask the Court to dismiss the petition. You must give in a responsive plea.

1858.

March 8.

PYNE *v.* PYNE, on Motion.PYNE
v.
PYNE.*Petition for Dissolution of Marriage at Suit of Wife.—
Practice.*

A petition for dissolution of marriage by reason of the husband's adultery and desertion, directed to be amended by a distinct averment of the fact of desertion; some statement of circumstances in such a petition may be necessary, but evidence should not be pleaded.

This was a petition for dissolution of marriage on the part of the wife, by reason of the husband's adultery and desertion.

On an affidavit of the personal service of the citation, and on an affidavit that up to the 4th of March no appearance or answer on behalf of Mr. Pyne had been entered in the registry;

Dr. Phillimore, Q.C., moved the Court, under the 21st rule, to direct the manner in which the cause should be tried.

THE JUDGE ORDINARY: Before I make any order in this case, if I am competent to do so, I wish to direct your attention to the form of the petition. It prays for a dissolution of marriage at the suit of the wife; adultery alone therefore will not be sufficient. The petition goes into a long statement of circumstances, from which I presume it is intended to set up a case of desertion as well as adultery; but I can find no distinct averment of the desertion. In such a case it may be right to state some circumstances, though care should be taken not to plead evidence. I should advise the petition to be withdrawn and amended. Every such petition should contain a distinct averment of the grounds on which it depends.

WRIGHT *v.* WRIGHT, on Motion.

Amended Petition.—Practice.

Notice of application for leave to amend should be given to the other party, or the petition may be withdrawn and served *de novo*.

Dr. Deane, Q.C., moved for leave to amend the petition for dissolution at the suit of the wife.

THE JUDGE ORDINARY: You must give notice of your application to the other side.

1858.
March 8.

Dr. Deane, Q.C.: With your Lordship's permission we propose to withdraw the petition, and serve it again on the respondent.

WRIGHT
v.
WRIGHT.

THE JUDGE ORDINARY: You are at liberty to do that.

HAYWARD v. HAYWARD, on the Admission of the Plaintiff's Responsive Allegation. March 2 & 19.

Suit for Restitution of Conjugal Rights.—Insanity of Wife.

HAYWARD
v.
HAYWARD.

The wife libelled for restitution of conjugal rights. The husband alleged the wife's insanity and a morbid hatred towards himself, which rendered cohabitation unsafe. The wife's responsive allegation allowing that she had been insane, but asserting her recovery and denying the facts on which the husband relied to show continuance of insanity, admitted to proof.

This was a suit for restitution of conjugal rights, brought by Christi Annette Hayward, wife of Edward Hayward, against her husband. The suit was commenced in February, 1857, in the Arches Court of Canterbury. The libel was in the usual form, pleading the marriage of the parties in August, 1838, and charging Mr. Hayward's refusal to cohabit since November, 1856.

The allegation brought in on behalf of Mr. Hayward stated, that in the course of the year 1854 Mrs. Hayward entertained a groundless aversion and hatred to her husband, and used such threats, and sometimes actual violence towards him, that he was obliged to sleep in a separate room, the door of which, for his personal security, he kept locked; that in the spring of 1855 the aversion to her husband assumed a decidedly morbid character, and was accompanied by delusions in other respects, in consequence of which she was, on the 15th of April, 1855, placed in a lunatic asylum at Ticehurst; that during her stay there the leading feature of her insanity continued to be the same causeless hatred of her husband; that

1858. in December, 1855, her mind having become gradually tran-
March 2 & 19. quillized, she had leave of absence from the asylum for two
months; and on the 17th of February, 1856, she was dis-
charged therefrom, restored to her natural state of mind, by
the authority of her husband; that thereupon she was re-
ceived into Mr. Hayward's house, where she lived till Septem-
ber, 1856; but that shortly after such final discharge Mrs.
Hayward renewed her violent and frantic conduct towards her
servants, her only child, and especially her husband; that she
got possession of a carving-knife and a dagger, and made
totally unfounded charges of her husband's cruelty towards
herself; that in September, 1856, Mr. Hayward, under the
advice of Dr. Conolly and of his own medical attendant, placed
her at a private house in Southborough, in the county of Kent,
from which she escaped in the month of November, and on
the 20th of November presented herself at Mr. Hayward's
then residence at Hastings, where she conducted herself with
such violence that Mr. Hayward told her that it was impos-
sible, with any reasonable regard to his personal security, that
they could continue to live in the same house; whereupon, on
the day following, Mrs. Hayward came up to town, and has
since been living in apartments, where she had been and still
was, and from time to time would be, supplied by Mr. Hay-
ward with adequate means, relatively to Mr. Hayward's in-
come, of supporting herself.

The admission of this allegation was opposed; but on the
19th of November, 1857, after hearing counsel thereon, the
learned Dean of the Arches was pleased to admit the same.

The responsive allegation on behalf of Mrs. Hayward, which
formed the present subject for the consideration of the Court,
denied the causeless aversion towards her husband set forth in
his allegation; stated that Mr. Hayward had slept in a sepa-
rate room since 1844, assigning the state of his health as his
reason for so doing. It asserted that the alleged lunacy of
Mrs. Hayward had its origin in the ill-treatment and violence
of her husband; that especially, in consequence of an alterca-
tion which took place between them in March, 1854, she be-
came so irritated and excited that Mr. Hayward procured the
certificate under which she was confined at Ticehurst. It
denied that after she was discharged in February, 1856, she

conducted herself in a violent, frantic manner ; alleging that the carving-knife was a common kitchen-knife, which she had for the purpose of opening a deal box ; and the dagger, a Russian sword, which had been given her as a curiosity. It stated that on her escaping from the house at Southborough, where she alleged she had been illegally confined, she upbraided her husband for his conduct towards her, and that, on his persisting in refusing to allow her to remain in his house, she went to London. The allegation went into the question of maintenance since she had been lodging in London apart from her husband—a part of the case of no importance for the present purpose,—and concluded by asserting that Mrs. Hayward, since the month of November, 1856, up to the present time, had been, and had conducted herself as a sane person, and had been in the habit of paying and receiving visits, and seeing her friends on the footing of any visitor in society.

1858.
March 2 & 19.
—
HAYWARD
v.
HAYWARD.

Dr. Addams, Q.C., and *Mr. Cooper*, opposed the admission of this responsive allegation.

Dr. Phillimore, Q.C. and *Dr. Waddilove*, *contrà*, contended that this allegation was admissible as in part traversing and in part explaining the averments of the allegation admitted on behalf of Mr. Hayward.

Ultimately counsel agreed to take into consideration an offer of the husband to settle on the wife for her life a sum to be fixed by the arbitration of some members of the Bar, on condition that Mrs. Hayward should provide a trustee who should indemnify Mr. Hayward against his wife's debts. This attempt at an arrangement, however, failed, and on the 19th of March—

THE JUDGE ORDINARY: As to the question, whether this allegation should be admitted, the case seems to stand thus. The wife sues for restitution of conjugal rights. The husband, by his allegation, says that she has unhappily become insane, and has taken a violent dislike to him personally ; that that dislike has assumed a morbid character, and that in fact she has been and is subject to insane delusions, and has been for

March 19.

1858.
March 19.
HAYWARD
v.
HAYWARD.

a time necessarily confined in a lunatic asylum; that since her discharge therefrom she has conducted herself in a frantic and violent manner towards him, so that it is unsafe for him, having regard to his own personal security, to live with her. The wife, in reply, says that she was let out of confinement by her husband's own sanction, and that after her discharge he turned her out of his house, and that she was obliged to go to London, and live in lodgings there. There is a controversy whether, since her discharge from confinement, she again manifested symptoms of insanity, by concealing a dagger or a knife intending therewith to do violence to her husband? The parties then are in this curious position. If this lady at the time alleged concealed a dagger or a knife intending to do violence to her husband, being insane, and she turns out to be insane, I find no authority for holding that that is an answer to a claim for restitution of conjugal rights. A husband is not entitled to turn a lunatic wife out of doors. He may be rather bound to place her in proper custody, under proper care, but he is not entitled to turn her out of his house. He is less than ever justified in putting her away, if she has the misfortune to be insane. On the other hand, she insists she is not insane, and if her assertion can be established, she would be responsible for those acts of violence, and her husband would be justified in refusing to receive her, or in using force to restrain her. That would be an answer to an application to the husband to receive her. But I must assume, that Mrs. Hayward denies those facts, which would be an answer to this application. I think there are one or two precedents, which authorize the admission of this allegation. The allegation of Mrs. Hayward must therefore be admitted to proof.

HAYWARD v. HAYWARD, on Allotment of Alimony *pendente lite*. 1858.
March 13 & 19.

Husband and Wife.—Alimony *pendente lite*.

HAYWARD
v.
HAYWARD.

A husband may deduct from income derived from real property the expense of ordinary current repairs, but not of extraordinary and permanent improvements, which ought to be charged on the fund of the income. The husband is liable for reasonable expenses incurred by his wife till the decree for alimony is made. Where several months had elapsed from the return of the citation, and £50 had been paid on account by order of the Court, an alimony *pendente lite* of £120 per annum was decreed, payable from the date of the decree.

This was a question of alimony *pendente lite*, arising in a suit brought by Mrs. Hayward for the restitution of conjugal rights.

Mr. Hayward, in his answers to the allegation of faculties, admitted that he had received from his father, in 1846, £1600, which he had laid out in the purchase of a freehold property; that, under his father's will in 1853, he became possessed of real property, which he sold for £2400, and of £16,000 personalty, of which he laid out £11,485 in the purchase of real property; that since his father's death he had lived as the rate of £1700 per annum, principally at his wife's instigation, thereby absorbing the remainder of the capital he received under his father's will. He admitted an income of £615 from real property, from which he claimed to deduct £150 for necessary repairs and outgoings; that he was possessed of paintings to the value of about £400; of plate, linen, and furniture to about £550; of diamonds to the value of £740; of hops, horses and farm stock to about £1070. But he stated that his wife's expenses and debts contracted by her since November, 1856, were very considerable, amounting, so far as had already come to his knowledge, to more than £300.

On the 5th of December, 1857, the Dean of the Arches decreed £25 on account of alimony, and on the 9th of March the Judge Ordinary decreed a similar sum. The citation in this cause was returned on the 13th of February, 1857.

Dr. Phillimore, Q.C., and Dr. Waddilove, for Mrs. Hayward,

1858. cited, as to the principle on which alimony *pendente lite* is
 March 13 & 19. given, *Hawkes v. Hawkes*, 1 Hagg. Ecc. Rep. 526. As to the
 HAYWARD proportion usually adopted, *Frankfort v. Frankfort*, 4 Notes
 v. of Cases. As to the time for which it is generally payable,
 HAYWARD. *Hammerton v. Hammerton*, 1 Hagg. Ecc. Rep. 23. As to what
 the husband's answer ought to contain, *Harris v. Harris*,
 1 Hagg. Ecc. Rep. 351, in which case it was held that the value
 of all marketable securities and whatever might be converted
 into money, must be included in the calculation of the hus-
 band's income. In the same case Sir John Nicholl directed
 the alimony to commence from the return of the citation, and
 that the amount of all debts which the wife had incurred since
 that time, and which had been discharged by the husband,
 should be first deducted.

Dr. Addams, Q.C., and Mr. Cooper, for Mr. Hayward, ad-
 mitted the general principles laid down on the other side,
 though they varied when applied to particular cases. Occa-
 sionally, when the wife did not examine witnesses on her alle-
 gation of faculties, but was dissatisfied with the husband's
 answers, she had brought in an affidavit. It was, however,
 allowed on the other side that this was irregular. The ques-
 tion was, what is the real amount of Mr. Hayward's income?
 The expense of upholding property was a proper deduction
 from income; taking the husband's answers most strongly
 against himself, his income could not be more than £400,
 and he had himself and daughter to support.

THE JUDGE ORDINARY: Current repairs from year to year,
 I think, you would be entitled to deduct from annual income.
 Extraordinary improvements must fall on the total fund of
 income. On the whole, this is a question of facts, and I must
 carefully examine those facts to enable me to form my judg-
 ment upon them.
Cur. adv. vult.

March 19. THE JUDGE ORDINARY gave judgment: This is a question
 of alimony which was argued before me the other day, and I
 have endeavoured to make out the accounts of the husband's
 property, so as to do justice between the parties. The hus-
 band, in his answers, admits having received under his father's

will £16,000 in money and £2400 the proceeds of the sale of real property. He says, he expended in the purchase of real property £11,485, which would leave a balance of £6915, which he says he spent in the course of four years, living in an extravagant manner at his wife's instance. He may have spent it, but there must be some misapprehension as to his having spent it all at her instance, for she was away from him a considerable part of those four years. However, there is no denial that he has spent the money, and that it is gone. I cannot grant alimony on the presumption that he has it; so it must be deducted. He further admits the ownership of real property producing an income of £615; but he claims to charge it with £150 annually for repairs and improvements. That is too much; some portion of such an outlay must be put down to permanent improvements, and which are not necessary from year to year. Probably £500 may be taken as the fair annual value of this property. I reckon his hops and farm stock at a value of £1050; furniture, etc., at £1200. The learned counsel for Mr. Hayward very candidly stated, that he did not object to a charge of four per cent. on that part of the property, which is unproductive. Four per cent. on these unproductive portions of the property will give another £100 per annum, and bring the total income up to £600, of which I shall allot one-fifth, £120, as fair alimony *pendente lite*. Alimony is generally due from the return of the citation; but here I feel some difficulty as to this part of the case. It is said that the wife has contracted debts to a considerable amount for which the husband is responsible. The husband is not protected from liability for his wife's debts incurred before the decree for alimony is made. Some allowance ought, therefore, to be made on that score out of alimony. A great deal of discussion has taken place about the *amount* of debts contracted by the lady, but I cannot take that circumstance into consideration, because the husband is at law liable only for a reasonable amount, considering the lady's position. And if she should have contracted extravagant debts, I cannot assume that juries would find verdicts against the husband for extravagant amounts. It may be that by his own conduct in paying debts of a similar description before, he had sanctioned a larger credit than would be otherwise given to her. If so,

1858.

March 19.

 HAYWARD
 v.
 HAYWARD.

1858.
March 19.
HAYWARD
v.
HAYWARD.

he must suffer for his own imprudence, but I cannot take the large amount of her debts into consideration in dealing with this subject. I must assume that he is only liable for a reasonable sum for her support. But as he has already paid £50 in this suit on account of alimony *pendente lite*, I think it will satisfy the justice of the case, if I make the payment of the £120 to commence from the present date (the date of the decree), and not from the date of the citation.

Ex parte
ALDRIDGE.

Ex parte ALDRIDGE.

Protection for Wife's Earnings.—Desertion.

Quære, whether, under the words of 20 & 21 Vict. c. 85, sec. 21, a woman resident within the city of London can obtain an order for protection of her property?

The absence of a husband in his ordinary occupation as mariner does not constitute desertion; and the Court cannot take into consideration an actual desertion in past years, which has been terminated by a return to cohabitation.

This was an application for protection of the wife's earnings under section 21 of the Divorce Act, which enacts that "A wife deserted by her husband may at any time after such desertion apply to a police magistrate, if resident within the metropolitan district, or, if resident in the country, to justices in petty sessions, or in either case to the Court, for an order to protect any money or property she may acquire by her own lawful industry, etc., provided always that every such order, if made by a police magistrate or justices at petty sessions, shall, within ten days after the making thereof, be entered with the registrar of the County Court within whose jurisdiction the wife is resident."

Dr. Addams, Q.C., apprehended there might be a difficulty in the Court making the order prayed by Mrs. Aldridge. She was resident within the city of London, and the terms of the 21st section seemed inapplicable to residents within the city.

THE JUDGE ORDINARY: It is certain that parties living within the City have not the remedy intended by the Act to its

full extent, as there are no police magistrates and no County Courts in the city of London; but those provisions of the sections do not affect this Court: at the same time I am aware, that there is considerable doubt as to the validity of the order, if I were to make it. But I have a further difficulty in this case; it appears that the husband has gone to Australia as a sailor: if he has gone merely as a sailor, in such capacity, how can you treat that as a case of desertion?

1858.

March 19.

Ex parte
ALDRIDGE.

Dr. Addams: It appears from Mrs. Aldridge's affidavit, that from 1845 to 1856 her husband deserted her; that he returned in 1857, and then cohabited with her for a time, but has now gone away again without making any provision for her.

THE JUDGE ORDINARY: The former desertion was entirely put an end to by the return to cohabitation. I cannot connect the present absence with the former. Revival of condoned cruelty by a slight act of cruelty goes on the principle that, taken altogether, the husband's conduct shows such an *animus* as renders it unsafe for the wife to live with him; but desertion under this section is quite a different matter. I should like to be satisfied in what capacity the husband has gone to Australia, whether as a seafaring man or otherwise. The first consequence of an order made now might be that some creditor of the husband would contest its validity. If, however, I were satisfied that it was a case of desertion, although I have doubts as to my jurisdiction, I would make the order, and leave the Common Law Court to settle any question that might be raised as to its validity. The application had better stand over; possibly the difficulty as to the wording of the section may be removed before long.

1858.
March 19.
—
DEANE
v.
DEANE.

DEANE v. DEANE.

Judicial Separation.—Practice under 20 & 21 Vict. c. 85.

The affidavit of the petitioner required by section 41 will not be taken as evidence at the hearing, but the parties must produce sufficient evidence to prove the petition independently of such affidavit. The Court is bound by the rules of evidence as observed at common law, section 48.

SEMBLE: the fact of an appearance having been given to the citation, no further steps in the suit having been taken by the defendant, will not be considered at the hearing as any proof of identity.

This was a suit for a judicial separation, promoted by Mrs. Deane against her husband by reason of his adultery. The suit commenced in the Court of Arches, and a citation was personally served on the husband in the Camp at Aldershott, on the 14th of October, 1857. He at first appeared by a proctor, but had taken no steps since. Mrs. Deane's petition was in the form in use in the present Court, and this was the first case in which the Court pronounced a decree on *vivâ voce* evidence.

The marriage took place in December, 1835, and there were several children born, of whom eight were now alive. Mr. Deane had latterly joined the Berkshire militia, and went by the appellation of Captain Deane. The adultery charged was alleged to have been committed in the course of 1857, at Oxford, with a Miss Turner, with whom Captain Deane became acquainted in consequence of joining in some amateur theatricals.

Dr. Phillimore, Q.C., and *Dr. Spinks*, for Mrs. Deane.

Dr. Phillimore wished, before calling witnesses, to ask the opinion of the Court whether the affidavit of the petitioner verifying the petition could be used as evidence at the hearing; whether the 41st and 46th sections of the Divorce Act, taken together, did not by implication repeal, at least in part, the 3rd and 4th sections of 14 & 15 Vict. c. 99 (Lord Brougham's Evidence Act).

THE JUDGE ORDINARY: The affidavit of the petitioner under section 41 is a preliminary step merely—it gives the security of

the oath of the party that the proceeding is *bond fide*. No person is allowed to commence a proceeding without pledging on oath to the truth of the facts (within his or her knowledge) upon which the proceeding is founded ; but I have considered the point you mention, and am of opinion that I am not at liberty to take any notice at the hearing of the affidavit of the party so given. The 48th section of the Divorce Act is precise in its directions, that “ the “ rules of evidence observed “ in the Superior Courts of common law at Westminster shall “ be applicable to and observed in the trial of all questions of “ fact in this Court.” This confines me within the limits of 14 & 15 Vict. c. 99, and you must deal with this case as if there were no evidence at present before the Court.¹

1858.
March 19.
—
DEANE
v.
DEANE.

Elizabeth Sainsbury was then called : Was cousin of the petitioner, formerly Anne Sandars, and present at her marriage in 1835 to a gentleman of the name of Arthur Deane, at St. Mary's, Reading ; the usual entries were made in the register ; had visited them since, when living together as man and wife.

Richard Grant, clerk to Mr. Hanson, a fruit merchant in the city of London : The copy of the marriage certificate of Arthur Deane, now produced, has been collated by me with the original at St. Mary, Reading, and is a true copy. In the summer of 1856 I remember a gentleman by the name of Captain Deane calling at Mr. Hanson's warehouse on several occasions ; saw him several times in Mr. Hanson's counting-house ; next saw Captain Deane at Oxford on the 15th or 16th of September, 1857 ; a friend pointed out Captain Deane as we were walking down the Corn-market ; followed him and saw him go into Mrs. Cooke's, No. 12, Gloucester-green ; recognized him as the same person who went by the name of Captain Deane at Mr. Hanson's in 1856 ; next saw him at Aldershott later in 1857, when I served the citation on Captain Deane ; could tell the exact day by reference to memorandum of expenses ; it was the 14th of October. Captain Deane said, “ Oh, very well,” or some such remark.

¹ The attention of the Court was not on this occasion called to the 43rd section of the Divorce Act, which gives the Court power to order the attendance of the petitioner, and to examine or permit him to be examined or cross-examined on oath at the hearing of the petition.—*(Editor's Note.)*

1858.
March 19.
—
DEANE
v.
DEANE.

Samuel Hanson, a fruit merchant in the city, had known Arthur Deane all his life; was intimate with his mother and grandfather; knew his wife since their marriage, and had stayed with them at Lawrence Waltham; saw Arthur Deane several times in the summer of 1856 at his counting-house on matters of business; understood he was then in the Berkshire militia; no other Captain or Mr. Deane called on him at that time; had no communication with Arthur Deane by letters or otherwise in 1857. The letter now produced I swear to be in his handwriting; it is dated 12, Gloucester-green, Oxford, 31st of August, 1857, and is written to Mrs. Deane.

THE JUDGE ORDINARY asked for the letter and read it, observing that if the letter is used at all, the other party is entitled to have the whole before the Court. I will look through it and see whether it makes in any way in his favour. I see he speaks of a desire to quit the militia.

William Peachy, master of the Ship inn at Oxford: A gentleman came to my house about January, 1857, who called himself Captain Deane; he engaged a bed-room and had the use of a sitting-room.

THE JUDGE ORDINARY: This is merely *de bene esse* in case you afterwards identify this person as being the party in the suit.

Examination continued: He was accompanied by a female he called his wife; they remained about three days and occupied the same bed: he said they were going to perform at the Star Hotel in some theatrical representations; I went there and saw them.

Here Mrs. Deane was produced to the witness, who said she was not the person who accompanied Captain Deane to the Ship in 1857.

Eliza Cox, servant to last witness, confirmed his evidence.

Louisa Cook: I live at 11, Gloucester-green, Oxford; am a laundress and let lodgings. In July, 1857, I remember a Captain Deane bringing as a lodger to my house a person called Mrs. Turner. Captain Deane, so he called himself, lodged next door. He was constantly with Mrs. Turner. Mrs. Turner generally breakfasted in bed, but one evening she said she would not do so the next morning, and I met Captain Deane coming out of the bedroom about 10 A.M. Captain Deane often spoke of his wife, and said she was at Reading.

Another gentleman, a Mr. Belmont, was lodging at No. 12 at the same time.

Emily Warland, servant to the last witness, swore to having seen the persons calling themselves Captain Deane and Mrs. Turner in bed together.

1858.
March 19.
—
DEANE
v.
DEANE.

Dr. Phillimore, Q.C., submitted that the evidence given had sufficiently proved the marriage, the adultery of the husband, the identity and diversity of the parties, namely, that the man who cohabited at Oxford with Mrs. Turner was the husband of Mrs. Deane the petitioner, and that Mrs. Turner was not the wife of Captain Deane.

THE JUDGE ORDINARY: There is no proof of the identity of the defendant with the person who was at the Ship hotel in January, or that Deane who acted at the Star hotel was the defendant. The only proof of identity at Oxford is offered by Grant, who saw him go into Mrs. Cooke's, and identifies that person as the Captain Deane who had called at Mr. Hanson's in 1856 on several occasions, and there is reasonable evidence that the person Grant then saw was the defendant. One or two of the links in the chain of evidence are very fine; but there is his own handwriting that he was in fact staying at the adjoining house, No. 12, Gloucester-green, in the autumn of 1857. I can give no weight to the fact that he appeared to the citation: as a set-off against that, Mrs. Deane has had the benefit of her witnesses not being cross-examined; I think the case is proved, but there is nothing to spare. I must pronounce for the judicial separation.

Dr. Phillimore applied for permanent alimony. Mr. Deane had an income of £164, and there are eight children, none of whom are with the husband.

THE JUDGE ORDINARY: I shall decree a moiety of that income under the circumstances—say £80 per annum to Mrs. Deane.

1858.

March 2 and
April 16.

HOPE v. HOPE.

HOPE v. HOPE. *Suit for Restitution of Conjugal Rights.—Previous Suit for Divorce.—Par Delictum.*

A wife brought a suit for divorce against her husband by reason of his adultery; the husband recriminated the wife's adultery; and the suit was dismissed on the ground that both parties were proved to have been guilty of adultery. The wife subsequently instituted a suit for restitution of conjugal rights. The husband brought in an allegation pleading in bar of her suit the previous suit and sentence.

Held, that the wife by reason of her adultery, (though the husband had also been guilty of adultery,) could not sustain a suit for the restitution of conjugal rights.

This was a suit for restitution of conjugal rights, commenced in the Consistory Court of London, and promoted by Mrs. Emilie Mélanie Mathilde Hope against her husband, Adrian John Hope, Esquire.

In 1853 a suit for divorce had been instituted in the same Court by Mrs. Hope against her husband by reason of his adultery; Mr. Hope recriminated his wife's adultery; and the Court dismissed both parties from that suit, as being *in pari delicto*, by reason of each of them having been guilty of adultery.

The present suit was brought by Mrs. Hope, as was stated by her counsel, from absolute necessity, with a view to obtain a maintenance from her husband.

The cause was very fully argued before the learned Judge of the Consistory Court of London, in Michaelmas Term, 1857, who reserved his decision; but before he had an opportunity of delivering it, by 20 & 21 Vict. c. 85, the jurisdiction of the Consistory Court in matters matrimonial was abolished; and by virtue of the same Act the present suit was transferred to this Court.

The case was now re-argued before the Judge Ordinary.

Dr. Twiss, Q.C., and *Dr. Spinks*, for Mrs. Hope: The real question raised in this suit is, whether the sentence, pronounced in the previous suit for divorce dismissing both parties therefrom, is a bar to a suit for the restitution of conjugal rights. The Court, in deciding this question, will be guided by the principles which obtained in the Ecclesiastical

Courts (20 & 21 Vict., c. 85, s. 22). We cannot cite any case decided in those Courts precisely in point. But when upon a question of matrimonial law no decision could be found in the records of the Ecclesiastical Courts, the Canon law is the source whence they derived their principles. (*Proctor v. Proctor*, 2 Cons. Reps. p. 300. See also *Dalrymple v. Dalrymple*, Ib. p. 67.) The Canon law, which it is submitted should rule this case, does not allow parties who have entered into the social status of married parties to withdraw from cohabitation without the sentence of a legal tribunal to this effect. The law recognizes no intermediate state between a cohabitation and a formal separation: *Proctor v. Proctor*, ib. p. 299. A competent Court has refused to decree a formal separation between these parties; the law therefore imposes upon them the duty of cohabitation. The fact of Mrs. Hope having been pronounced guilty of adultery will not relieve her husband from this duty, as he was declared by the same sentence to be *in pari delicto*. The Canon law in such a case, there being a *par delictum*, would apply the doctrine of compensation. "*Paria crimina compensatione mutua delentur*." This well-known doctrine of the Canonists is discussed in two passages in the Canon law. Decr. Greg. IX., 5 tit. 16 vi. & vii. The Canonists have continually in their mouths the doctrine of *compensatio criminis*. [THE JUDGE ORDINARY: A curious doctrine this,—a singular kind of subtraction,—to subtract crime from crime, and there remains nothing but innocence.] This doctrine is also discussed in Sanchez, *De Matrimonio*, B. x., *De Divortiiis*, Disput. 6; also in Ayliffe's *Parergon*, title Divorce, p. 226. [THE JUDGE ORDINARY: Ayliffe puts it as a proceeding *in pœnam*, that a husband for a punishment shall be obliged to receive back his adulterous wife. But if both are guilty, why should one only be punished?] The husband is only bound to take his wife to his home. Mrs. Hope brings this suit as the sole means by which she can compel her husband to support her. [THE JUDGE ORDINARY: Have you any such doctrine as the restitution of limited conjugal rights?] This Court does not pretend to enforce the duty of matrimonial intercourse, only that of matrimonial cohabitation: *Forster v. Forster*, 1 Cons. Rep. 154; *Orme v. Orme*, 2 Add.

1858.

March 2 and
April 16.

HOPE v. HOPE.

1858. 382. In the case of *Denniss v. Denniss*, 3 Hagg. Eccl. Rep. 353 note, where a suit brought by a husband against his wife for divorce by reason of her incestuous adultery was dismissed on the ground of his having connived at her incest, the Court observed, "That it would not necessarily follow, "that in a suit for restitution of conjugal rights, the Court "would compel the husband to return to an incestuous "bed." But there is a broad distinction between adultery which is incestuous, and adultery which is not incestuous, and the exception here adverted to in the case of incestuous adultery goes to establish the rule that we are contending for. What were the antecedent duties of these parties? 1st, Cohabitation; 2nd, the duty of the husband properly to maintain his wife. In the previous suit for divorce, he sought to be discharged from the duty of cohabitation. His prayer was refused. The antecedent duty reverts. Oughton, in his *Ordo Judiciorum*, a work of great authority in the Ecclesiastical Courts, vol. 1, Tit. 216, lays it down, that a party proceeding for restitution of conjugal rights, though guilty of adultery, is entitled to succeed, provided *compensatio criminis* be established.

Dr. Phillimore, Q.C. (for Mr. Hope), was not disposed to dissent from the general propositions laid down on the other side. Mr. Hope, however, was not the person who brought the present question before the Court, but Mrs. Hope.

The legal proposition has never yet been judicially solved, whether either of two parties, who have been declared equally guilty in a Court of Matrimonial Jurisdiction, can appear again, and call upon the Court to exercise its power in respect of their matrimonial relations. It is not denied that no wife in Mrs. Hope's position has ever brought a suit for restitution of conjugal rights, but it has been argued, on principle and on analogy drawn from decided cases, that she is entitled to her prayer. The proposition laid down, on the other side, as to the Canon law, is not true to its full extent. The Canon law is the basis on which the matrimonial law of Europe is founded, but an alteration took place at the Reformation, and the Canon law has only been held binding so far as it has been adopted by the law and the usage of this country. Hence

the term, the "King's Ecclesiastical law." As to the particular Canon law cited there is valid reason for not importing it into the Queen's Ecclesiastical law. In the case relied upon, *Proctor v. Proctor*, taken altogether and not in part, it may be seen how much of the Canon law was imported, and how much rejected. The Canon law applied to parties so situated its own discipline, and in that way avoided the chance of debts and spurious offspring; but that part of the law was never received in England. It would be introducing that which stands at variance with English, and almost Protestant life. The Canon law compelled the husband to take back his wife, but when? after a course of spiritual discipline; Sanchez has a chapter on this very subject. The Canon law could enforce *debitum conjugale* by spiritual censure. In this respect our law falls short.

1858.
March 2 and
April 16.

HOPE v. HOPE.

There are precedents in our Ecclesiastical decisions indirectly in our favour: 1st, in *Denniss v. Denniss* it is intimated that a party dismissed from a suit for divorce on the ground of *connivance*, might be dismissed from a suit for restitution of conjugal rights brought by the other party. And in *Moore v. Moore*, 3 Moo. P. C. C. 84, it is laid down that a plea insufficient in support of a suit for divorce, may be sufficient as a bar to a suit for restitution.

In the absence of direct precedents in our Ecclesiastical Courts we do not even find a tradition of such a law prevailing. Is there anything like authority at Common law? The point has at least been incidentally considered in questions of maintenance: *Govier v. Hancock*, 6 T. R. 603; *Rex v. Flinton*, 1 B. & A. 227.

Dr. Deane, Q.C., on the same side.

Cited, *Manby v. Scott*, 1 Siderfin, 104; S.C. 2 Smith's Leading Cases, 250.

This point is raised for the first time by Mrs. Hope; the object of the suit is to compel the husband to take the wife back again. [THE JUDGE ORDINARY: How would the matter stand as to contracts? He is not now liable for the debts; if he takes her back again, would mesne debts attach? If she succeeded in a decree for restitution, it would import that she had been improperly excluded; would not debts attach?] *Dr. Deane*:

1858. She might come back and bring an adulterer with her. What
 March 2 and remedy would the husband have? he is barred by his previous
 April 16. adultery. When there is a sentence of dismissal, the Court
 HOPE v. HOPE. Christian in effect says, "Each party is deprived of our assistance, they are outlaws." Again, many acts which are not sufficient to obtain a remedy are sufficient in bar;—a husband could not obtain divorce on the confession of the wife alone, but could the Court compel restitution when the wife had confessed? Oughton is an authority on practice, but not on law. Mr. Hope now is not liable for his wife's debts, Co. Litt. 32. a. What authority has the Court of Matrimonial Jurisdiction to alter the responsibilities of husband and wife?

Dr. Twiss, Q.C., in reply.

Cur. adv. vult.

April 16. THE JUDGE ORDINARY: This suit was commenced in the Consistory Court of London by Mrs. Hope against her husband for restitution of conjugal rights. The libel pleaded the marriage, the birth of three children, and the refusal of the husband at and after a certain time to permit the wife to live and cohabit with him.

The defendant on the 6th of June, 1857, brought in an allegation, pleading (amongst other things) fourthly, that the complainant voluntarily quitted his house; and fifthly, as follows:—"In further contradiction to what is untruly pleaded "as aforesaid in the fourth article of the said libel, the party "proponent alleges and propounds, that the said Emilie Mélanie Mathilde Hope, shortly after she had so voluntarily as "aforesaid quitted the house of her said husband to wit, on "or about the month of September, 1853, instituted in this "Court a suit for divorce against the said Adrian John Hope, "by reason of alleged cruelty and adultery; that after such "the institution of the said suit, it came to the knowledge of "the said Adrian John Hope, that the said Emilie Mélanie "Mathilde Hope had formed in the year 1846, and had subsequently carried on, an adulterous connection with Count "Olympe Aguado, who during such period principally resided, "and does still principally reside, at No. 18, Place Vendôme, "in the city of Paris; that accordingly such the adultery of "the said Emilie Mélanie Mathilde Hope, with the said Count

“Aguado, was pleaded in the same suit in an allegation on 1858.
 “behalf of the said Adrian John Hope; that the said suit April 16.
 “proceeded in due course, and was concluded on or about the HOPE v. HOPE.
 “19th day of July, 1855, when the following decree was duly
 “made therein. The Judge having read the proofs, and
 “heard advocates and proctors on both sides thereon, by his
 “interlocutory decree, having the force and effect of a defini-
 “tive sentence, in writing pronounced, decreed, and declared
 “that Emilie Mélanie Mathilde Hope, wife of Adrian John
 “Hope, had failed in proof of so much of the libel admitted
 “in this cause as charged the said Adrian John Hope with
 “cruelty, but had sufficiently proved so much of the said
 “libel as charged the said Adrian John Hope with adultery,
 “and that the said Adrian John Hope had been guilty of adul-
 “tery as therein pleaded; and he further pronounced, that the
 “said Adrian John Hope had also sufficiently proved the alle-
 “gation given in by Bathurst, and that the said Emilie Mé-
 “lanie Mathilde Hope had been guilty of adultery as therein
 “pleaded, and therefore dismissed as well the said Adrian John
 “Hope as also the said Emilie Mélanie Mathilde Hope from
 “this suit, and all further observances of justice therein. In
 “verification of what is hereinbefore alleged, the party pro-
 “ponent craves leave to refer to the acts and records of this
 “Court. And this was and is true, and the party proponent
 “alleges and propounds as before.” That allegation stood for
 admission; then Mrs. Hope brought in an allegation of facul-
 ties for alimony, and Mr. Hope was assigned to answer; but
 he prayed to be heard on petition to show why he ought not
 to be called upon to assign alimony. She answered. The mat-
 ter was argued and stood for judgment, when the authority of
 the Consistory Court was abolished, and all suits then pend-
 ing were transferred to this Court; and I much regret that
 the parties and the public cannot now enjoy the advantage of
 having this question determined by the very learned person
 who for so many years presided in the Consistory Court with
 so much benefit to the suitors and honour to himself. In this
 Court the learned advocates agreed to abstain from all discus-
 sion on technical points, and to argue the main question only,
 viz. whether a wife, having been guilty of adultery, the husband
 also being guilty, can claim restitution of conjugal rights?

1858. It was admitted on both sides, that the records of the Ecclesiastical Courts of this country furnish no case exactly in point, so that, being left without any former precedent for my governance, I am compelled now to establish one, availing myself of such assistance as can be derived from the *dicta* bearing on the subject, which have from time to time fallen from learned judges presiding in our Courts, whether spiritual or temporal. The argument for Mrs. Hope was simply this, that cohabitation is a duty resulting from marriage, and that neither party can lawfully withdraw from cohabitation without the judgment of a Court, which in this case the husband not only had not obtained, but having asked the proper tribunal to release him from that duty, his prayer was rejected; and secondly, that the guilt of each being the same, their mutual delinquencies were thereby compensated, and both were restored to their original position as innocent parties. The first proposition is hardly to be sustained, for an innocent husband may withdraw from cohabitation with a guilty wife without being subject to any legal proceeding for so doing, and if the wife were to sue for restitution of conjugal rights, her suit would fail on proof of her guilt. But the question remains whether the guilt of the wife is to be considered as abolished by that of the husband, so as to restore her to the condition of an innocent person with reference to her conjugal rights. The authority mainly relied on in support of that proposition was *Proctor v. Proctor*, 2 Hagg. Cons. Rep. 292, not as a decision on the point now under consideration, but for certain expressions of Lord Stowell as to the extent to which the Canon law is to be considered as binding in questions of marriage, and its rights and duties, for undoubtedly in the Canon law authority may be found for saying, that where both husband and wife are guilty of adultery, the husband cannot refuse to receive his adulterous wife. In 2 Cons. Rep., page 300, that eminent person thus speaks of the Canon law: "Upon the first point, the binding authority of the "Canon law in causes matrimonial depending in these Courts, "I look without success for any principle on which I can hold "that they can release themselves by any power of their own "from a submission to that authority. The release, if proper, "must come from a higher authority than they possess. It

"is notorious that this country at the Reformation adopted 1858.
 "almost the whole of the law of matrimony together with April 16.
 "all its doctrines of indissolubility, of contracts *per verba de*
 "*præsenti et per verba de futuro*, of separations *à mens et* HOPE v. HOPE.
 "*thoro*, and many others; the whole of our matrimonial law
 "is in matter and form constructed upon it; some Canons of
 "our own may have varied it, and a higher authority, that of
 "the Legislature, has swept away some important parts of it;
 "but the doctrine of indissolubility remains in full force. The
 "very practice of the Legislature in granting by special Acts
 "particular divorces in particular cases affirms the indissolu-
 "bility as existing in the general law, and to be maintained
 "in their dispensations of justice." This latter proposition,
 viz. that marriages are indissoluble, was the important one for
 the decision of the case then before the Court. The husband
 sued for a divorce on the ground of adultery. The wife re-
 criminated. The adultery of the wife before the suit was
 proved. The husband also was proved to have been guilty,
 but not until after the commencement of the suit, and the
 question to be decided was, whether under such circumstances
 he could have a divorce. The learned Judge held, that the
 marriage was by our law, following the Canon law, indisso-
 luble; that the infidelity of the husband was therefore *par*
delictum with that of the wife, and that consequently he would
 not have a legal separation. That was the only point deter-
 mined in *Proctor v. Proctor*, and is obviously far short of an
 authority for the decision of that now before the Court. But
 Lord Stowell in the course of his judgment says, of the Canon
 law as affecting the case of mutual guilt, "It provides against
 "the mischiefs to which a husband might be exposed by such
 "a wife living apart, by its known doctrine, that all separa-
 "tions merely voluntary are totally illegal, not to be either
 "tolerated or presumed. It acknowledges no intermediate
 "state between a cohabitation and a formal separation. It
 "therefore presumes, when it withholds its divorce of separa-
 "tion, that the parties return to cohabitation; all matters re-
 "turn to their former course, but with increased vigour; the
 "husband and wife live again on their former footing, and
 "there is no anticipation of separate debts, or of the probabi-
 "lity of a spurious offspring. That such is the doctrine of

1858. " the Canon law is most certain ; the authorities are numerous
 April 16. " and precise to that effect." His Lordship then cited several
 passages to that effect, which are printed in a note to Dr.
 HOPE v. HOPE. Haggard's Report of the Judgment. In some it is said that
 "*paria crimina mutud compensatione delentur*;" in others,
 "*mutud compensatione ambo adulteria abolentur*," and that
 the husband may be compelled to take his wife back. If in-
 deed whatever is found in the Canon law on this subject is to
 be accepted as an authority binding the Courts of this coun-
 try, the passages cited would show that the wife in this case is
 entitled to a decree in her favour. But in the case of *Reg. v.*
Millis, 10 Cl. & Fin., Lord Chief Justice Tindal, in giving the
 answers of the Judges to the question proposed by the House
 of Lords, thus describes the effect to be given to the Canon law of
 Europe: " That the Canon law of Europe does not and never
 " did, as a body of laws, form part of the law of England, has
 " been long settled and established law. Lord Hale defines
 " the extent to which it is limited very accurately ; the rule,
 " he says, by which they proceed is the Canon law, but not in
 " its full latitude, but only so far as it stands uncorrected
 " either by contrary Acts of Parliament, or the Common Law
 " and custom of England ; for there are divers Canons made
 " in ancient times, and Decretals of Popes, that were never
 " admitted here in England." The Lord Chief Justice then
 quotes the following passage from *Cawdrie's case*, 5 Co. Rep. 1 :
 " As in temporal causes the King by the mouth of the
 " Judges in his Courts of Justice doth judge and determine
 " the same by the temporal laws of England, so in causes
 " Ecclesiastical and Spiritual, as, namely (amongst others enu-
 " merated), rights of matrimony, the same are to be deter-
 " mined by Ecclesiastical Judges according to the Ecclesias-
 " tical law of this realm." He afterwards adds, " So albeit
 " the kings of England derived their Ecclesiastical laws from
 " others, yet so many as were proved, approved, and allowed
 " here by and with a general consent are aptly and rightly
 " called the King's Ecclesiastical Laws of England." The Ca-
 non law of Europe therefore binds the Courts in England, not
 simply because it is the Canon law, but because it has been
 approved and allowed here ; to that extent, and to that ex-
 tent only, is this Court bound to give effect to it. And not-

withstanding the general expressions on this subject ascribed to Lord Stowell in *Dalrymple v. Dalrymple*, and *Proctor v. Proctor*, I infer from another passage in the latter case, that he would have entertained at least grave doubts as to the propriety of giving effect to the Canon law in its full latitude, had the question now raised been brought before him for his decision, for in 2 Hagg. Cons. Rep. 302, he says: "Taking this (viz. that the adultery of the husband was a bar to his suit for divorce on account of the adultery of the wife), as I think I am compelled to do, as the rule of the law binding upon the judgments of this Court, I cannot blind myself to the fact, that the modern course of life and manners does not furnish those corrections of the mischiefs that may follow, which the Canon law had anticipated in connection with its rule. There is no return to cohabitation, nor any means to be resorted to for the purpose of compelling it." This passage leaves me in some doubt, whether his Lordship meant to say, that the law of this country does not furnish the means of compelling a return to cohabitation, or that the usage of society would prevent either party from taking advantage of those means. But whatever be the real meaning of the passage, what is there to show that the state of things described by him has arisen from the modern course of life and manners, and did not always exist in this country? for I have not discovered—and, what is more important, the industry of the learned Counsel engaged in this case has failed to discover—any decision or *dictum* of any Judge, authorizing the opinion that under such circumstances as exist in the present case a decree for restitution of conjugal rights could at any time have been obtained. There is in Oughton's *Ordo Judiciorum* a statement that such would be the case; under his tit. 216, *De causis quæ impediunt restitutionem obsequiorum conjugum in causâ matrimoniali*, he says, "*Probatio quod post contractum vel citra solemnizatum matrimonium ac recessum mulieris a viro (vel e contra) vir vel uxor commiserit adulterium sufficit ad impediendum restitutionem in causâ matrimoniali. In hoc tamen casu, si actor replicaverit et probaverit compensationem, vel scientiam, condonationem, vel remissionem criminis, obtinebit actor restitutionem petitam.*" In *Mortimer v. Mortimer*, 2 Hagg. Cons. Rep. 317, Lord

1858.

April 16.

HOPE v. HOPE.

1858. Stowell mentioned Oughton as an authority of no mean
April 16. consideration in matters of practice in that Court; from
HOPE v. HOPE. which limited praise I infer, that equal attention has not
been paid to his statements of the law in other respects,
unless he refers to some other authority. In the passage
quoted, he puts *compensatio criminum*, connivance and con-
donation, on the same footing. By connivance in this and
other passages, I take it that the party is supposed so to con-
nive as to give a willing consent to the act, although not
an accessory before the fact; in such a case it is consistent
with reason to say, that the party so consenting shall not
be allowed to take advantage of the guilt contracted by doing
the act consented to. So as to condonation, it is reasonable
to say, that an offence which has been blotted out by forgive-
ness shall not afterwards be made the subject-matter of ac-
cusation. But the same observation is not strictly applicable
to a case of compensation by mutual guilt. Both break
the sacred obligation into which they have entered; neither
instigates or consents to; neither pardons the offence of the
other; and although it may not be competent to either to ob-
tain the assistance of a Court to punish the offence committed,
it by no means follows, as a reasonable consequence, that each
shall be bound to treat the other as an innocent party. There
is a passage in Lord Stowell's judgment in *Beeby v. Beeby*, 1
Hagg. Eccl. Rep. 789, which seems at variance with Oughton's
doctrine even as regards the effect of condonation. The hus-
band there sued for a divorce on the ground of adultery; the
wife pleaded in bar the adultery of the husband. It was
argued, but not pleaded, that the evidence proved condonation
of his guilt. Lord Stowell, at p. 797, deals with this point as
if it had been pleaded. He says: "But what is the effect of
" condonation? In general it is a good plea in bar, it is not
" fit that a man should sue for a debt which he has released;
" but here the plea in bar is *compensatio*, and condonation
" is not in bar of the action, but a counter-plea. Here the
" wife does not pray relief, but prays to be dismissed. It does
" not follow that the same act which will bar the remedy will
" operate on the other side; and unless it is a universal law,
" that whatever is a plea in bar, and disables a party from
" bringing a suit, likewise destroys the defence, the present

"attempt cannot avail the husband. A man, it is true, who
 "has forgiven adultery cannot bring a suit, but when he com-
 "plaints of his wife, will her forgiveness of his previous mis-
 "conduct make him a proper person to receive the sentence
 "of the Court? Does her act bind the Court? If both are
 "equally guilty, will her condonation make him *rectus in*
 "*curia*, and enable him to procure a sentence?" The decision,
 however, did not proceed on that ground, for Lord Stowell
 considered that condonation was not proved. If the opinion
 which from that passage Lord Stowell may be presumed to
 have entertained be sound, it would apply to this case also.
 Can a wife, guilty of adultery, say that she is *recta in curia*
 because her husband also is guilty? Does his act bind the
 Court, and enable her to procure a sentence? Here the whole
 matter appears on the plea, and the case must be considered
 as if the husband had pleaded the adultery of the wife, and
 his adultery had been alleged by way of counter-plea. A ques-
 tion similar to that which I am now called upon to decide was
 involved in the case of *Naylor v. Naylor*, of which a note was
 read by Dr. Lushington in giving judgment in *Astley v. Astley*,
 1 Hagg. Eccl. Rep. 714. It was tried by Dr. Bettesworth in the
 consistory Court in 1777. The wife sued for restitution; the
 husband pleaded her adultery in bar: the wife recriminated.
 Whether by counter-plea, or whether the point was raised in
 the evidence only (as in *Beeby v. Beeby*), does not appear.
 The learned Judge decided that the guilt of the wife was fully
 proved, but that the charge against the husband was not
 proved. He had, therefore, no opportunity of deciding the
 question now raised; he said, indeed, "that according to the
 "law of the Ecclesiastical Court, if the guilt of the husband
 "were proved, it would prevent his obtaining his prayer,"
 which, I presume, was for a divorce; but he does not go on to
 say that the wife would therefore have obtained a decree for
 restitution. To adopt the language of Lord Stowell in *Beeby*
v. Beeby, if both were equally guilty, that might not make her
 a proper person to receive the sentence of the Court, and Dr.
 Bettesworth does not say that it would; but the force of the
 argument, founded on Lord Stowell's observations, in *Beeby*
v. Beeby, is certainly diminished by the opinion expressed by
 Dr. Lushington in *Anichini v. Anichini*, 2 Curt. 210. That

1858.

April 16.

HOPE v. HOPE.

1868. was a suit by the wife for restitution ; the husband pleaded
April 16. her adultery in bar, and prayed a sentence of separation ; she
HOPE v. HOPE. recriminated ; he rejoined condonation. Dr. Lushington, in
giving judgment, stated that although Lord Stowell had not
in *Beeby v. Beeby* decided the point, he inferred that his
opinion was that a husband who had committed adultery
could not, notwithstanding condonation, afterwards obtain a
divorce *à mensd et thoro* on account of the adultery of
the wife, and from that he, Dr. Lushington, dissented ; and
in the case then before the Court, which disclosed gross
adultery on the part of the wife, and a single act of adul-
tery by the husband long before fully condoned, he decreed a
separation according to the prayer of the husband. The
learned Judge does not say what would have been his decision,
had the evidence of condonation failed. But undoubtedly
there is another passage in this judgment, from which, if con-
sidered by itself, and without reference to the facts of the case
then before the Court, it may be inferred that in that event he
would not have felt justified in refusing to decree restitution.
“ I know no authority,” he says, “ which states that whatever
“ be the guilt of both parties, if the Court does not pronounce
“ for a separation, they are not according to the law of this
“ country bound to live together, and I think such a principle
“ would be dangerous to society and to public morals.” But
during the argument in this case, it was forcibly contended
by the counsel for the defendant, that if an adulterous wife
could claim the assistance of this Court to enforce restitu-
tion of conjugal rights by reason of the husband’s equal
guilt, a principle much more dangerous to society and to
public morals would be established ; for the husband’s vio-
lation of the marriage vow remaining uncondoned (for a
suit for a restitution is said not to be a condonation) will be
a perpetual bar to any proceeding against the wife for re-
petitions of her offence, however numerous and shameless,
and committed under his own roof ; and the wife would be
equally without remedy for the misconduct of the husband.
With that observation I agree, and cannot but think that, as
far as public morals and the interests of society are concerned,
it would be better to act upon the suggestion, not say the
opinion, thrown out by Lord Stowell in *Beeby v. Beeby*, that

a party guilty of a breach of the marriage vow should not have the assistance of the Court to enforce any marital right. In the case of *Kirby v. Kirby* (reported in a note to *Anichini v. Anichini*, 2 Curt. 215) the wife sued for restitution; the husband pleaded the adultery of the wife, and prayed a divorce. She offered an allegation denying her guilt, and recriminating, and also prayed a divorce. The admission of the allegation was opposed; Sir W. Wynne admitted the allegation, and after some preliminary observations said, "If both prove adultery, it is not necessary to say now what would be the consequence; perhaps the Court might say it would give no sentence." In that case neither party succeeded in proving adultery, but the wife would not revert to her original prayer, and both parties were dismissed. After some research bestowed on this question, the *dictum* of Sir W. Wynne; the principle suggested, rather than enunciated by Lord Stowell in *Beeby v. Beeby*; his intimation in *Proctor v. Proctor* that in such a case as the present no means could be resorted to for the purpose of compelling cohabitation, and the passage cited from Dr. Lushington's judgment in *Anichini v. Anichini*, are all the lights that I have been enabled to obtain from the reports of the Ecclesiastical Courts. But there are two decisions of the Court of Queen's Bench which it is important to consider. The first of them, *Govier v. Hancock*, occurred in 1790, and is reported in 6 T. R. 613. It was an action of assumpsit for the board and lodging of the defendant's wife. It appeared in evidence that the defendant having committed adultery with a woman named Beazeley, whom he had brought home, treated his wife with great cruelty, and finally turned her out-of-doors; then the wife committed adultery; after which she offered to return home, but her husband would not receive her, and this action was brought for her board and lodging subsequent to that time. It was held that the action could not be maintained, and the Court said, "That in this case, if the wife had instituted a suit in the Ecclesiastical Court against the husband for restitution of conjugal rights, they would not have assisted her." And a similar opinion was expressed by the same Court in 1830, in *Rex v. Flinton*, 1 B. & Ad. 227, which was an appeal against a conviction of a husband for refusing to maintain

1858.

April 16.

HOPE v. HOPE.

1858. his wife. It appeared that the wife committed adultery,
April 16. which was not then known to the husband; she and her husband afterwards quarrelled and separated, and then he committed adultery. The wife sued in the Ecclesiastical Court for a divorce on the ground of the husband's adultery, and claimed alimony; he recriminated. The guilt of both was proved, and the suit was dismissed. The husband then refused to maintain his wife, and was convicted under 5 Geo. IV. c. 83, s. 3. Bayley, J., asked, "How can it be said that he "is liable to maintain her, if he can neither be sued for maintenance found her, nor for restitution of conjugal rights?" And the whole Court concurred in quashing the conviction. This then is the result of my investigation of this question. I find in a decretal of Gregory IX., an assertion that an adulterous wife was entitled to be received by her husband, if he also had been guilty of a similar offence, and this is mentioned as the law by several canonists: Lancellottus; Sanchez, *De Matrimonio*; and Ayliffe (in his *Parergon*). I do not find any instance in which the law so laid down has been adopted and acted upon as part of the Ecclesiastical law of this land. I find a dictum of Sir W. Wynne, that under such circumstances, a suit for restitution would probably be dismissed, and there is ground for inferring that such was the opinion of Lord Stowell. The Court of Queen's Bench, in two cases occurring after an interval of thirty-five years, expressly declared that such was the law prevailing in the Ecclesiastical Court. In my humble judgment, that rule is sound in principle, and calculated to prove beneficial in its operation. I have therefore come to the conclusion, that the suit for restitution in this case cannot be sustained, and that the husband must be dismissed.

CASES

IN THE

COURT OF PROBATE.

In the Goods of HERBERT CALTHORPE GARDNER, Esq.
(deceased), on Motion.

1858.
April 16.

Will.—Probate as contained in an Affidavit.

In the Goods of
HERBERT
CALTHORPE
GARDNER.

A. made his will in 1855. In May, 1857, when the Indian Mutiny broke out, he escaped from Delhi, leaving his will, among other property, behind him; he died at Kussowlee in June, 1857. On the affidavit of one of the attesting witnesses as to due execution, and of the same witness and of his widow as to the contents, probate was granted to the widow, as sole executrix.

The deceased in this case, a captain in the 38th Bengal Light Infantry, made his will at Cawnpore, in the East Indies, in May or June, 1855. The deceased, his wife, and their two only children, were in Delhi in May, 1857, when the mutiny broke out; they escaped from that city, leaving all their property behind them, among which was the deceased's writing-case, in which his will was deposited. Captain Gardner died at Kussowlee on the 28th of June, 1857, leaving his widow and two only children, the only persons entitled in distribution in case of an intestacy.

The joint affidavit of Mrs. Gardner and of Lieut. Hawes, one of the attesting witnesses, established the due execution of the will in 1855, and its contents, namely, leaving all his property to his wife, and making her sole executrix. Mrs. Gardner spoke to having frequently read it over, and to having seen it in her husband's desk as lately as February, 1857, and to her assurance that it had not been revoked or destroyed by her husband prior to their leaving Delhi, and that since the

1858. recapture of Delhi nothing had been heard of the will. The property amounted to about £1000.

In the Goods of
HERBERT
CALTHORPE
GARDNER.

Dr. Phillimore, Q.C., moved the Court "to decree probate of the will as contained in the affidavit to be granted to the widow, the sole executrix named therein, limited until the original will or a more authentic copy thereof shall be brought into and left in the registry of the Court." He submitted there was before the Court sufficient proof of the execution and contents of the original will, and cited *Trevelyan v. Trevelyan*, 1 Phill. 153.

SIR C. CRESSWELL: The case of *Brown v. Brown* lately decided in the Court of Queen's Bench, and on which I have already acted,¹ went beyond the present case. There parol evidence was held sufficient to prove the contents of a will, and thereby revoke a will of earlier date, which was in existence at the testator's death. I grant the motion.

April 20.

In the Goods of JENNY WATSON, Spinster (deceased),
on Motion.

In the Goods of
JENNY
WATSON.

Administration (with Will annexed).—Specific Legatee.

An application for grant of administration (with the will annexed) to the sole legatee, on an affidavit that the testatrix died possessed of no other property than that specifically described in the will:

HELD, that no reason was shown for not citing the next of kin; that they must be cited; or that administration might be taken, limited to the property specified in the will.

This was a question as to the right to the administration (with the will annexed) of the goods of the deceased.

The will was as follows:—"I, Jenny Watson, of 20, Wilton Terrace, near the Old Kent Road, declare this to be my last will and testament. I give and bequeath to Amelia Sarah Lyon . . . my wearing apparel, and all my effects of every kind at my present dwelling, and also the amount now stand-

¹ In the Goods of William Brown, *supra*, p. 32.

"ing in my name in the Savings Bank in Bloomfield Street, 1858.
 "Moorfields. As witness my hand . . ." Thus there was no April 20.
 appointment of executor or residuary legatee. It appeared
 on affidavit that all the property which the deceased died In the Goods of
 possessed of was that specified in the will, amounting in the JENNY
 whole to about £28. A. S. Lyon was a *feme covert*. The WATSON.
 practice of the registry would hold the next of kin entitled
 in such a case.

Dr. Wambey moved the Court to decree administration
 (with the will annexed) to Mrs. Lyon, as the sole legatee.
 Under the circumstances of the property, as it appeared in
 Mrs. Lyon's affidavit, she was in effect, though not in terms,
 universal legatee. As to passing over the next of kin, the
 leaning of the Court of Probate had been to follow the in-
 terest. (*West and Smith v. Willby*, 3 Phill. 381.) And if the
 residuary legatee, who had no statutable right, was, by the
 practice of the registry, allowed to exclude the next of kin
 from the representation on the established principle that the
 right to the administration should follow the right of the
 property, *à fortiori* would the universal legatee be entitled to
 the preference.

SIR C. CRESSWELL: But in this case there is no residuary
 clause, and I cannot even take Mrs. Lyon to be universal
 legatee. To entitle you to the motion, some reason should
 have been given for not inviting the next of kin to come for-
 ward. You must either cite the next of kin, or you may take
 administration limited to the property disposed of by the will.

In the Goods of JAMES CARR (deceased), on Motion.

April 16.

Revocation.—Lost Letters of Administration.—Practice.

In the Goods of
 JAMES CARR.

Upon the revocation of letters of administration, which have been lost,
 an undertaking will be required from the person to whom they were
 granted, that, if found, he will bring them into the Registry, and that
 they will not be acted upon.

Letters of administration to the effects of the deceased hav-

1858. ing been granted to Mr. Reynolds, Solicitor to the Treasury,
 April 16. on the suggestion, (since discovered to have been erroneous,) that the deceased had died intestate, without leaving any person entitled in distribution, application was now made to the Court to revoke the same, and to grant administration to A., as the lawful next of kin of the deceased.

In the Goods of
 JAMES CARR.

The Queen's Advocate (Sir J. D. Harding) stated, that from the affidavit of Mr. Reynolds it appeared that the letters of administration originally granted could not be found.

SIR C. CRESSWELL: I think it right your motion should be granted. But ought not the Court to have some security from Mr. Reynolds that, if the letters of administration be found hereafter, he will bring them into the Registry? Mr. Reynolds should give an undertaking to bring them in, and that they shall not be acted upon in the event of their being found.

April 16-20.

In the Goods of ELIZABETH MERRITT (deceased).

In the Goods of ELIZABETH MERRITT. *Execution of a Power by Will.—General Revocatory Clause in a later Will.—7 Will. IV. & 1 Vict. c. 26, s. 27.*

E. H., a married woman, in 1846, duly made a will in execution of a general power of appointment, disposing of certain stock, and appointing executors thereof. In 1855 she made another will, without the consent of her husband, disposing of certain other property under her marriage settlement, and of other articles; it did not refer to the general power, under which the will of 1846 was made, nor to the stock thereby appointed; but it contained a general revocatory clause, and named a different executor.

Held, that the 27th section of the Wills Act was intended to enlarge the dispositive power of testators, and has no bearing on questions of revocation;

That the revocatory clause in the will of 1855, being in general terms, and containing no reference to the general power in execution of which the will of 1846 was made, or to the property thereby appointed, did not operate to revoke that will.

E. Harding, by her will, bequeathed £650, 3 per Cent.

Consols, to trustees upon trust to pay the dividends thereof to her daughter, Elizabeth Merritt, (the deceased in this case,) during her life for her separate use, and after her decease she directed the same to remain upon such trusts as the said E. Merritt should by her last will appoint; and, in default of appointment, she directed the trustees to apply the stock and dividends in such manner and such proportions as they might consider most for the benefit of any child or children of the said Elizabeth Merritt, as might be living at the time of her death.

1858.
April 16—20.
In the Goods of
ELIZABETH
MERRITT.

In August, 1846, the deceased made and executed a will, and thereby, after referring to the power given to her by her mother's will, she directed that the trustees should after her death, in case her husband survived her, pay the dividends of the said stock to him for the term of his natural life, and that after his death, they should stand possessed of the said stock in such manner as directed by her mother's will; she appointed executors of this will, which disposed of no other property, than as above mentioned.

Besides this property under her mother's will, the deceased had a separate life income under the will of her brother, but no power to deal with that by will; and under her marriage settlement she had power to dispose of £1400 Consols thereby settled by will amongst her children; and also, with the consent in writing of the trustees of her marriage settlement, to revoke by deed the trusts of such settlement, and appoint new ones.

On the 13th of February, 1855, her husband being then in Australia, the deceased made a will in the following terms:—

"This is the last will and testament of me, Elizabeth Merritt.

"I give and bequeath unto my eldest son, William Harding Merritt, all my plate and plated articles, and I appoint Thos. Newton my sole executor of this my will, for the purposes herein mentioned. And I direct my executor to pay all my just debts, notes of hand, bonds, or any and every other security for any moneys which I may have received out of my own settlement of £1400, which was taken out of the Basingstoke Bank by Charles Bailey, Esq., solicitor. And I hereby revoke any settlement of such £1400 I may

1858. "have heretofore made; and it is also my will and desire that
 April 16-20. "the sum of £105, out of the aforesaid settlement of £1400,
 In the Goods of "be paid to the trustees or directors of St. Anne's School at
 ELIZABETH "Brixton, in the county of Surrey, for the education of my
 MERRITT. "youngest son, Walter Merritt, as soon as his age will admit
 "of his being therein received after my decease; and further,
 "that the sum of £6 per annum be paid unto Patience
 "Merritt, during the term of her natural life, out of the
 "interest arising from the residue of the £1400; and that at
 "my decease the remainder of principal and interest be paid
 "unto my husband, W. Merritt, in case he shall survive
 "me, if otherwise, such moneys to be then divided, share
 "and share alike, among and between my surviving children.
 "All my household furniture, trinkets, ornaments, and wear-
 "ing apparel, I give and bequeath unto and for the use of
 "my dear family of children; and I revoke all former wills
 "by me at any time heretofore made. In witness whereof
 "I have to this my last will and testament, contained in this
 "sheet of paper, set my hand and seal, this 13th day of Feb-
 "ruary, 1855. ELIZABETH MERRITT."

This will was written on one of the printed forms of wills bought at stationers' shops, and there was no authority from her husband to authorize her to make such will.

The deceased died in February, 1855, leaving her husband and the said William Harding Merritt and six other children her surviving. Shortly after, the trustees of her marriage settlement, with which the will of 1855 purported to deal, filed a Bill in Chancery against T. Newton, the executor, and W. Merritt and his children, for an administration of the funds of that settlement, and the Master of the Rolls decided, that that will did not affect the trusts of the settlement, and decreed the trusts to be specifically performed, and that the trust fund then in Court was distributable as in default of appointment.

On the 15th of February, 1856, a Special Grant of Administration was made by the Prerogative Court of Canterbury to the said W. Merritt, of the goods, etc., of the deceased, except any property which by the will of her said mother, or by her marriage settlement, she (the deceased) had power to dispose of, and had disposed of by the above-mentioned wills; the

suit in Chancery as to the operation of the second will on the trusts of the marriage settlement being then pending. The trustees of the £650 Stock had paid that sum into the Court of Chancery under the Trustee Relief Act. The executors named in the deceased's will of 1846, renounced probate thereof, and the present application was made by W. Merritt, the husband, for a further grant of letters of administration (with the will of 1846 annexed). It came before the Court on the 11th of March, on an *ex parte* motion. The Court, on hearing the statement of facts, desired the point to be argued, whether the general revocatory clause of the will of 1855 operated as a revocation of the execution of the power by the will of 1846. An appearance was subsequently given on behalf of Wm. H. Merritt, the son of the deceased, who with her other children took an interest, in default of appointment, in the £650, 3 per cent. Consols.

1858.

April 16-20.

In the Goods of
ELIZABETH
MERRITT.

Dr. Addams, Q.C., renewed the motion on behalf of William Merritt, for administration with the will of 1846 annexed. He submitted:—1st. That all questions of revocation were questions of intention; that the will of 1855 contained no reference to the appointment of the £650 by the will of 1846; and that, upon the facts above stated, it could not be assumed that there was any intention on the part of the deceased to revoke that will. 2nd. That, if by the general revocatory clause in the second will, the deceased intended to have revoked the first will, there would then arise a question of dependent relative revocation. The first will was in favour of the deceased's husband. It might possibly be, that she intended to revoke the first, upon the supposition that her husband would benefit under the second. But the disposition in his favour contained in the second will being clearly inoperative, the revocatory clause would be inoperative to revoke the first will.

Dr. Deane, Q.C., contra: By section ¹ 27 of 1 Vict. c. 26, the bequest of personal property in general terms includes per-

¹ The words of the section are:—"And in like manner a bequest of "the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include "any personal estate, or any personal estate to which such description

1858. sonal property over which the testator may have a general
 April 16-20. power of appointment, unless a contrary intention shall appear
 by the will. The deceased had a general power of appoint-
 In the Goods of ment over the property disposed of by the will of 1846. If
 ELIZABETH by this section she might execute this general power in general
 MERRITT. terms without referring to the power, she might revoke it in
 the same manner.

The revocatory terms are general. "I revoke all former
 "wills by me at any time made;" and there is nothing on
 the face of this will showing an intention that it should not
 operate upon the will of 1846. [SIR C. CRESSWELL: Is
 there anything upon the face of the will showing an inten-
 tion to dispose of this property?] There is; she revokes all
 former wills by her at any time made, and she had made
 no other will, save that of 1846, to which this clause could
 apply. (*Evans v. Evans*, 23 Beav. 1.) [SIR C. CRESSWELL:
 I doubt whether the revocatory clause acquires any strength
 from the Wills Act, to which you refer. The power was to
 dispose of the Stock by will. Were the revocatory words in-
 tended to operate as an execution of this power? If the paper
 of 1855 operates, the deceased has declined to execute the
 power. The object of the Legislature in this section was to
 give effect to the disposition of property.] To revoke all
 former wills was equivalent to a different disposition of pro-
 perty from that of the will of 1846. The question of in-
 tention seems only to be collected from the words of the in-
 struments themselves. [SIR C. CRESSWELL: I should like to
 know how you would have argued, before the Wills Act, such
 a case, and then to hear whether you think there has been
 any alteration in consequence of that Act; namely, 1st, a
 will purporting to be in execution of a power; 2nd. a will
 dealing with totally different property, not referring to the
 power, but containing a general revocatory clause.] The rule
 under the old law required express reference to the property
 comprised in the power. [SIR C. CRESSWELL: Just so. There
 are some authorities in 'Williams on Executors' in point. If I

"shall extend (as the case may be), which he may have power to ap-
 "point in any manner he may think proper, and shall operate as an
 "execution of such power, unless a contrary intention shall appear by
 "the will."

mistake not, they go to this ;—that a general clause, revoking all former wills, was not sufficient to manifest an intention to revoke a will made in execution of a power. The onus of showing that such was the intention,—ultra the words,—was on the other side. Are you relieved from that burden by the Wills Act ?] On the section of the Wills Act alone rests my argument.

1858.

April 16–20.

In the Goods of
ELIZABETH
MERRITT.

Dr. Addams, in reply : The Wills Act does not interfere with the regular province of the Court of Probate to arrive at the intention of the testator. In construction you cannot go beyond the four corners of the paper, but not so in determining the title to probate. The statute does not apply to the present case.

SIR C. CRESSWELL : The argument against you is, that the statute has given a technical effect to certain words to be found in the will. As at present advised, I quite agree with you ; but as the question has been raised on the statute, let it stand over.

Cur. adv. vult.

SIR C. CRESSWELL : I have looked at the statute in consequence of *Dr. Deane's* ingenious argument, that, inasmuch as since the Wills Act a bequest in general terms will operate upon property over which there is a general power of appointment, so a revocation in general terms will operate to revoke a will made in execution of a general power, although it contains no reference to that will. I cannot agree to this ; there are two sets of clauses in the Wills Act :—the first, dealing with modes of revocation of testamentary papers ; the second, with modes of disposition of property. The first set do not affect this case, which therefore follows the old rule, and the will of 1846, in execution of the power over the £650 Stock, remains unrevoked.

April 20.

I decree letters of administration with will annexed, as prayed.

1858.

ENOBIN and Others v. WYLIE.

April 16 & 20.

Will.—Domicil.—Probate.—Court of Construction.

ENOBIN AND
OTHERS
v.
WYLIE.

A., a natural born British subject, died domiciled in Russia, having acquired large property, both real and personal, in that country; he was also possessed of a considerable sum in the English funds. He left a will made in Russia, whilst he was domiciled there, in the Russian language and form, appointing Russian subjects executors, which will was duly authenticated in the Russian Courts. It purported to dispose of "all his movable and immovable property." There were no words distinctly excluding any part of his property from its operation, nor was there any allusion to, nor any words distinctly describing, the money in the English funds:

Held, that the executors, being clothed with the authority of the competent Court of the testator's domicil, were entitled to probate as regards the money in the English funds:

SEMBLE, where the Court of Probate has any doubt on a point of construction, it will so decide as will best enable the parties concerned to have recourse to the tribunals whose more special duty it is to put a construction on testamentary papers.

The testator, Sir James Wylie, Bart., had been long domiciled in Russia, and had amassed a large fortune in that country, in both real and personal property. He left also between £60,000 and £70,000 in the English funds. The present question was as to probate of his will, dated the 12th of February, 1852, drawn in the Russian language, and executed in the Russian form, appointing three Russian subjects executors, and which was authenticated in a competent Russian Court in the course of 1854, the testator having died in February of that year.

The will purported to dispose "of all his movable and immovable property honestly acquired by himself." It directed all buildings and lands to be sold, "the money proceeds of the above, as also the whole of his capital which should remain after his death in ready money, and in bank billets belonging to him," to be divided into ten parts, eight of which were to be applied to the establishment of some public or charitable benefit, under the direction of the Emperor. "Any other disposal made previous to this one, concerning his movable and immovable property, by whatever papers and acts such might be found, or by whomsoever produced,

“should be considered as of no effect, null and void. . . And 1858.
 “as all his movable and immovable property was his own, April 16 & 20.
 “and honestly acquired by himself, so nobody had a right to
 “interfere with his dispositions, and contest the same under
 “any pretence whatever; and likewise no one had a right to
 “interfere with or contest the dispositions and proceedings of
 “his executors.” “As executors to this his testament, he
 “named . . .” There was also a codicil and list of legacies
 in small amounts, which was refused authentication as not
 being duly attested.

ENOBIN AND
 OTHERS
 v.
 WYLIE.

After the death of Sir James Wylie in 1854, during which year Russia and Great Britain were in a state of war, Mr. Walter Wylie, his brother, in ignorance of the existence of the will, obtained letters of administration from the Prerogative Court of Canterbury as in case of an intestacy. Anne Wylie, as a party interested in the estate, filed a bill in Chancery against the administrator for the purpose of the estate being administered in that Court.

In June, 1855, a decree was made by Wood, V.C., directing an inquiry into the circumstances of the testator's domicile, property, etc., and the sum in the English funds to be transferred to the name of the Accountant-General. The chief clerk reported, that Sir James Wylie had died a domiciled Russian, and had left a will in the Russian language, which had been proved in that country, but that such will had reference only to property in Russia. Notice of these proceedings was subsequently served upon the executors in Russia, and they now applied to the Court of Probate to revoke the letters of administration granted to James Wylie, and to grant probate of the Russian will, in order to give them a *locus standi* in a Court of Equity, which would ultimately have to decide on the true construction of the will.

This application was opposed on behalf of Mr. Walter Wylie.

As regards the Russian law, the counsel for the next of kin relied on the opinion of two Russian advocates given on an A. B. case. A counter opinion on affidavit was produced on behalf of the executors. It also appeared on affidavit, that the usual stock receipts of investments in the English funds, which had been sent to the testator in St. Petersburg from time to time, were found, after his death, in the same box which contained

1858. the billets of the Commercial Bank of the Empire, which be-
April 16 & 20. longed to him.

ENOBIN AND
OTHERS
v.
WYLIE.

Dr. Addams, Q.C., and *Dr. Spinks*, for the next of kin :
Upon this case two considerations arise :—1st. Does this will dispose of that part of the testator's property which was invested in the English funds? We contend that it does not. 2nd. By what law is that to be determined? By the law of Russia or of England?

I. It is submitted, that, although the will was made in Russia by a domiciled Russian, it is not incumbent on the Court to resort to the law of Russia for the determination of the question of construction now raised. The law of the place of the domicile of the testator does not afford the *universal* rule for construing wills. "It does so in many cases, "and when you want to get at the interpretation of particular expressions, which are ambiguous, or of different significations in different countries" (4 Burge's Commentaries on Col. Law, 590). But this is not the case here. This will, on the face of it, does not affect to dispose of the testator's property in the English funds. In the outset it purports to dispose "of all his movable and immovable property;" but the dispositions in the body of it can only be taken to refer to his property in Russia. If a man at the top of his will says, "I dispose of two of my estates," and then proceeds to dispose of *one only*, the other would not pass under the will. From the character of the deceased, from the nature of his intercourse with his relations, and from his letters, in which he always speaks of them with kindness, it is most improbable that he could have intended to have excluded them from his property.

But, II. If, from any ambiguity in the terms of the will, it were incumbent on the Court to resort to the Russian law for the rule of construction, the evidence of the Russian lawyers is in favour of the construction we contend for. [SIR C. CRESSWELL : The opinions you have brought in are not upon oath. I apprehend I am taken to know nothing of the law of Russia, and can only treat it as a fact, to be proved, as any other fact.] [*The Queen's Advocate* : The will was not laid before their counsel.] The reason why the will was not laid

before counsel, and that we are unable to produce an opinion on oath, was, that the names of the late and present Emperors of Russia being mentioned in it, and the present Emperor taking an interest under it, no Russian advocate could be found to give an opinion, which might be adverse to the Emperor.

1858.

April 16 & 20.

ENOBIN AND
OTHERS
v.
WYLIE.

III. Letters of administration having been already granted to the next of kin, the Court will not revoke them unless they are clearly wrong.

The Queen's Advocate (Sir J. D. Harding), Dr. Phillimore, Q.C., and Mr. E. Karlake, for the executors.

I. The testator being domiciled in Russia, and the will being made there, it must be construed according to the Russian law (see Story on the Conflict of Laws, S. 498, a. ; 2 Williams on Executors, 980; *Trotter v. Trotter*, 4 Bligh (N.S.), 502; *Harrison and Others v. Nixon*, 9 Peters, 503 and 504). II. What is the true interpretation according to the law of Russia is matter of evidence, and must be proved. (*Yates v. Thompson*, 3 Cl. & Fin., 545; *Trotter v. Trotter*, 4 Bligh (N.S.), 502). The opinion on the A. B. case, not being on oath, is inadmissible. The counter opinion we have brought in is conclusive as to the interpretation of the will. III. It has been contended, that the grant of administration having been made, will not be revoked, unless it is clearly shown to have been a bad grant. But it was made by mistake. The English Court was taken by surprise; and the mistake ought now to be rectified. IV. The question, as regards the next of kin, is in reality one of form merely. For if probate be granted to the executors, the question as to the construction of the will will be reserved for the Court of Chancery, without prejudice to any one, and the next of kin, though the grant of administration may have been revoked, will still have a *locus standi* in the suit in that Court. Whereas if probate be refused, the decision, as regards the executors, will be final. They cannot obtain the opinion of the Court of Chancery on the interpretation of the will without probate; and if their present application be rejected, they will be debarred from having that question decided by the legitimate Court of construction.

1858.

Dr. Addams, Q.C., in reply.

April 16 & 20.

ENOBIN AND
OTHERS
v.
WYLIE.

SIR C. CRESSWELL: When I consider that the contest respecting this large sum of money will, in all probability, not rest here, but will be the subject of appeal, and as I have no doubt as to my opinion, I think I ought to give it at once, so that the parties may take the opinion of the Court of Appeal without unnecessary delay. I must also bear in mind another consideration, namely, that, if I grant probate, it in no way binds the Court of Chancery in the construction it may put upon this will, but merely gives the executors that without which they cannot appear in that Court at all. I think it is necessary for the executors to obtain probate before they can get a *locus standi* in the Court of Chancery. That Court has a sum of money to deal with, which is in the hands of the Accountant-General. The executors, as Russian executors, are not recognized in that Court; they cannot act upon the Russian probate in reference to this property, but they must have an English probate, otherwise the Vice-Chancellor would not entertain their suit. The Vice-Chancellor would not have sent the parties here, unless he had been of that opinion. I cannot think that any prejudice will arise to the next of kin by granting probate, or that any undue weight will be given to my opinion by the learned Judge before whom the cause may come. Now as to the point to be determined; it is said that I must determine it by the Russian law, inasmuch as it is a will made in Russia, by a domiciled Russian, in the Russian tongue, and altogether in accordance with the Russian law and form. I assent to this; I have accordingly endeavoured from the materials before me to ascertain what the rule of the Russian law, applicable to such circumstances, is, but without coming to any satisfactory conclusion. By the advocates examined on behalf of the executors, I find something like a rule of law stated, that the general expression, "all real and personal estate," includes everything wherever situated. Whilst those who have given opinions on this point on behalf of the next of kin, reason on the meaning of particular words used in the will, from which I conclude that they intend to state, that by the law of Russia you should endeavour to find out, as best you can, the meaning of the

testator, and should then give effect to his meaning. Again, 1858.
the advocates examined on behalf of the executors, say, April 16 & 20.
that the deceased cannot be considered to have died partially
intestate, for that the general expressions used in the
will include all movables and immovables, and pass every-
thing not distinctly excluded, and that this imposes the *onus*
probandi on the other side, to show that anything is dis-
tinctly excluded from the operation of those general expres-
sions. On turning, however, to the opinions on the other
side, I find that they pass by altogether the effect of the first
general expressions, "all movable and immovable property,"
and rely upon the description, which follows, of certain sorts
of property, to be adverted to presently; they do not refer to
any rule of law, but confine themselves to the meaning of the
particular words. If I look to the will itself, I find that it
begins, "I, the undersigned, etc. . . . make this my will, by
"which, in case of my death, I dispose of all my movable
"and immovable property, honestly acquired by myself, in
"the following manner." It then directs real property to be
sold, and that "the money proceeds of all the above, as also
"the whole of my capital which shall remain after my death,
"in ready money and in bank billets belonging to me." This
last expression may mean, "such part of my capital;" or,
perhaps, a more probable construction would be, "all my
"capital which I say exists in ready money or bank billets."
In a further part of the will, "any other disposal made pre-
"vious to this one, concerning my movable and immovable
"property, by whatever papers and acts such might be found,
"or by whomsoever produced, shall be considered as of no
"effect, null and void," etc. Now supposing that there had
been found a will of earlier date, disposing of British funds,
would not that have been revoked by such a will as the pre-
sent? I certainly am reluctant to have this Court turned
into a Court of construction, but it is forced upon me for the
day, and I am glad to think that the force and effect of my
so acting will not be very great. No doubt the executors will
go to a Court of Equity, and that Court will deem itself in
possession of the fund as a trustee for those really entitled
to it, and will give an independent construction to the
will, and by that construction, and not by mine, the question

ENOBIN AND
OTHERS
v.
WYLIE.

1858. will be determined. I have no doubt that Mr. Karslake is
 April 16 & 20. right as to the course matters may take in Chancery, and
 ENOBIN AND that, though the next of kin may be deprived of the charac-
 OTHERS ter of administrator, yet that they will be able in substance
 v. to continue the suit there as next of kin. As the effect of
 WYLIE. granting probate will be to give the executors an opportunity
 of litigating the question in that Court, which they would
 be deprived of, if I were to refuse it, I shall grant the pro-
 bate prayed for. I agree with the construction put on the
 will by the Queen's Advocate, and think the executors in
 Russia are entitled to probate with respect to the property in
 the English funds. I revoke the administration, and decree
 probate to the executors. It is quite a case, however, for costs
 out of the estate.

FARLAR v. FARLAR.

April 21. *Next of Kin.—Executor.—Plea.—Costs.—Practice.*

FARLAR
 v.
 FARLAR.

The next of kin may generally put an executor on the proof of a will and cross-examine the witnesses without making himself liable for costs; but if he pleads or takes any further step, he does so at his own risk. When a plea contains irrelevant matter it should be objected to.

This was a business of proving the will of John Farlar, promoted by his widow, the sole executrix named therein, against William Farlar, his only brother and next of kin. The declaration simply stated the *factum* and due execution of the will.

To this William Farlar pleaded :—1. That he was the brother and heir-at-law of the deceased. 2. The age of the deceased at his death, and that he and his brother had always lived on friendly and brotherly terms, and had corresponded with each other, the address of the said William Farlar being well-known to the plaintiff. 3. That deceased suffered from a serious illness which led to his death, and for six months previous thereto never left his fireside, nor entered into conversation with any one. 4. That the illness was concealed by the plaintiff from the defendant. 5. That the plaintiff never informed the defendant of the deceased's death till after the

funeral had taken place. 6. That the defendant had good reason to assert that the will was obtained by undue influence, while the deceased was incapable, through illness, of making his will. 7. That the will was drawn up and witnessed by a non-professional person, who knew that deceased had constantly refused to make a will. 8. That the words appointing the executrix were inserted after the execution of the will. 9. That the deceased died on the 11th of October, and that the will was dated the 3rd of the same month.

The plaintiff replied, denying the truth or relevancy of great part of the plea, negating undue influence or incapacity, and asserting that the appointment of executrix formed part of the will prior to its execution.

The defendant, who had conducted his own cause, did not appear at the hearing.

Dr. Swabey, for the plaintiff, having examined the attesting witnesses, submitted that they sufficiently proved execution and capacity, and asked for costs against the next of kin. The rule of the Prerogative Court had been, that the next of kin were, generally speaking, entitled to put the executors on proof of a will, and to cross-examine the witnesses, without being liable to costs, but if they went beyond this, they did so at their own peril. In the present case the defendant had not even attempted to support by evidence his plea, part of which had necessitated a reply.

SIR C. CRESSWELL: The plea should have been objected to. Great part of it has nothing to do with the issue. I think you are entitled to your costs from the date of giving in the plea.

1858.

April 21.

FARLAR

v.

FARLAR.

In the Goods of REBECCA SMITH, Widow (deceased),
on Motion.

April 26 & 28.

*Married Woman.—Separate Estate.—Husband Trustee.—
Jus Disponendi.*

In the Goods of
REBECCA
SMITH.

A. from time to time gave his wife sums of money, part of which accumulated as stock in his name; he received the dividends and paid

VOL. I.

K

1858. them to her, and in every way treated the stock as her separate property. The wife during coverture, with the husband's consent made a will, whereof she appointed an executrix, survived him a few hours and died without republishing the will :
 April 26 & 28.
 In the Goods of REBECCA SMITH. **H**ELD, that the testatrix had acquired a separate estate of which the husband had considered himself trustee for her, and to which the *jus disponendi* attached; and that her executrix was entitled to a limited probate.

This was the case of a will made by the deceased during coverture, with the consent of her husband; there was no settlement on her marriage, nor any instrument under which she had power to make a will during coverture. The deceased died on the 19th of January, 1858, about thirty-six hours after her husband, without having republished her will, which bore date the 4th of January, 1858. The affidavit of a daughter, who was named executrix in the will, proved that the husband of the deceased had been from time to time in the habit of presenting her with sums of money, part of which had accumulated, and was invested in the husband's name in the New Three per Cent. Stock; that he received the dividends and handed them to his wife; and that, if she had need of any of the capital, he was in the habit of giving her cash for it at the current price.

From a memorandum-book in the husband's handwriting it appeared, that he clearly treated the stock so accumulated as his wife's separate property; and in his will, dated July, 1857, and proved in the Court of Probate, was the following passage:—"And whereas there is now standing in my name "in the New Three per Cent. Bank Annuities, the sum of "£1100 stock, which in equity belongs to and is the sole "property of my said dear wife; now I do hereby declare the "same to be the sole property of my said wife, and direct my "executors hereinafter named to transfer or pay the same "to my said dear wife or her assigns, to and for her own "absolute use, benefit, or disposal, and so far as may be necessary or I can do, I hereby give and bequeath the same to "her."

The deceased's will was written by the husband at the wife's dictation, and there was no doubt of his entire consent to it.

Dr. Phillimore, Q.C., moved the Court to decree probate of the will of the deceased. Unless the case fell within the scope of those which decided that a married woman might dispose by will of her separate property, a difficulty might arise from the fact of there having been no republication after the husband's death. 1858. April 26 & 28. In the Goods of REBECCA SMITH. *Cur. adv. vult.*

SIR C. CRESSWELL: I find the passage in Roper, vol. i. 170, referred to by Dr. Phillimore, and adopted by Mr. Justice Williams, is to the effect, that the assent of the husband to his wife's will, is merely a waiver of his rights as her administrator, and that if he predecease his wife, her will, so far as it depends on his consent, is void against her next of kin. There are other rather nice distinctions drawn, where a married woman makes a will or appointment under a power, but those in no way affect the present case. There is a third class of cases, within which I think the present case falls, where the wife has been considered as possessed of a separate estate to which the *jus disponendi* attaches (*Fettilplace v. Gorges*, 1 Ves. jun. 44). I consider that the husband made himself a trustee of the stock in question for his wife. The executrix may take a probate limited to such property.

In the Goods of LOUISA GOODYAR (deceased), on Motion. April 28.

A General Bequest followed by Specific Bequests.—Universal Legatees in Trust. In the Goods of LOUISA GOODYAR.

A. B. left in the hands of trustees, "all the property she might be "possessed of at her death," etc., followed by an enumeration of properties, which however did not include the whole of her property:

Held, that the specific enumeration did not restrain the general terms preceding it, and that the trustees were entitled to administration with the will annexed as universal legatees in trust.

The deceased duly executed a will in May, 1851, in the following words:—"I, Louisa Goodyar, do herein will in the

1858. "hands of trustees the Rev. C. P.; J. M., Esq.; and the
 April 28. "Rev. A. G. M., all the property I may be possessed of at
 In the Goods of "my death, namely, such moneys as shall remain of the
 LOUISA "legacy of my uncle W. S., and also the legacy of W.
 GOODYAR. "G. P., being two thousand five hundred pounds, as well
 "as any other property or sums of money I should have
 "become entitled to, had I been living at such time as the
 "residuary legatees named in the will of the late W. G. P.
 "are paid off. All these sums to be by the above-named
 "trustees invested in the highest interest they can with safety
 "obtain." The will then proceeded to dispose of the interest
 and capital as therein mentioned, but there was no other
 mention of the residue, nor any appointment of executors.
 One of the trustees predeceased the testatrix, who died in
 January, 1858.

The bulk, but not the whole of deceased's property at her death was comprised in the items enumerated in the will. The question was, whether the surviving trustees were by the terms of the will entitled to administration with the will annexed, as universal legatees in trust, or whether the specifications following the word "namely," restricted the operation of the general words, "all the property I may be possessed of."

Dr. Deane, Q.C., moved the Court to "decree letters of administration with the will annexed to the surviving trustees as universal legatees in trust." He relied on the case of *Fisher v. Hepburn*, 14 Beav. 626. There the clause in question was, "And as to all the rest, residue and remainder of my estate and effects, whatsoever and wheresoever, canal shares, linen, plate, china, and furniture, I give, devise, and bequeath the same to my said wife, for her own use and benefit." The Master of the Rolls had no hesitation in reading it as a general residuary bequest, without giving any opinion as to its operation on real estate. His Honour continued: "The case of *Parker v. Marchant* has been relied on in reference to the circumstance, that the general words precede the enumeration; but, as was observed by Sir W. Grant, in *Cambridge v. Rous*, the latter are not words of restriction; they are rather words of enlargement. The object was to

“exclude nothing. Such an enumeration under a *videlicet*, a
 “much more restrictive expression, has been held only a de-
 “fective enumerative, not a restriction to the specific articles.
 “This is only a common residuary bequest.”

1858.

April 28.

In the Goods of
 LOUISA
 GOODYAR.

SIR C. CRESSWELL : The grant may go as prayed.

Motion granted.

SHAWE AND DICKENS *v.* MARSHALL AND OTHERS.

April 28 and
 May 6.

Legatee.—Interveners.—Costs.—Practice.

SHAWE AND
 DICKENS
v.
 MARSHALL
 AND OTHERS.

A., B., and C., three legatees named in a codicil, sought probate of it in solemn form against the executors named in the will. Subsequently to their having propounded the codicil, D., another legatee, intervened. The executors by their replication, which was given in after D. had intervened, admitted part of the alleged codicil, including the legacy to D.

HELD, that D. was not entitled to have his costs out of the estate.

This was a question as to the right of an intervener to costs arising in a cause of proving in solemn form of law a codicil to the last will and testament of Elizabeth Atherton, late of Clifton, in the county of Gloucester, spinster, deceased, promoted by William Shawe and William Dickens, the executors named in the said will, against Mary C. Marshall, widow, Mary A. Bulger and Lucy Makin, spinsters, legatees named in the said codicil, who were all represented by the same counsel and proctor, and also against Bertram Atherton, another legatee named in the said codicil, but who appeared by a different counsel and proctor.

The will, about which there was no dispute, was dated the 26th of August, 1856.

The codicil, which was duly attested, was in the following terms :—

“I give and bequeath to the under-mentioned persons the following sums in addition to those already mentioned in my will :—

1858.

"March 9th, 1857.

April 28 and
May 6.SHAWE AND
DICKENS
v.MARSHALL
AND OTHERS.

"*Free of Legacy Duty*.—To my cousin, Bertram Atherton, Esq., £2000. To my cousin, Lucy Makin, £2000. To Mary Ann Bulger, residing with me, £1000. To Mrs. M. C. Marshall, £1000. *Henrietta, Elizabeth, Mary, daughters of Mrs. Marshall, widow of the late Incumbent of Christ Church, each £500. To Misses Elizabeth and Caroline Justice, each £50. To Mary Portens, £500. To Mrs. Abigail Portens, £500. To my cook, Ann Sims, £50. To my housemaid, Mary Ann Edwards, £100. To my coachman, Charles Frew, £100.*

"ELIZABETH ATHERTON (L.S)."

The plaintiffs in their declaration propounded the will *only*, but to their affidavit of scripts, filed with the declaration, the said codicil was annexed, and described therein as a pretended codicil to the said will.

The three first-named defendants in their plea admitted the due execution of the will. They further pleaded, that the testatrix had made the said codicil to her said last will, bearing date the 10th day of March, 1857; and that the said testatrix by her said codicil, bequeathed certain legacies to the said M. C. Marshall, M. A. Bulger, and L. Makin and others. And after pleading the due execution of the said codicil, they alleged that the words "free of legacy duty," written under the third line of the said codicil, and the words and figures,—"*Henrietta, Elizabeth, Mary, daughters of Mrs. Marshall, widow of the late incumbent of Christ Church, each £500. To Misses Elizabeth and Caroline Justice, each £50. To Mary Ab. Portens, £500. To Mrs. Abigail Portens, £100,*"—written on the eighth and three following lines of the said codicil, were written and inserted in the said codicil after the execution thereof; and that the figures "£50" written in the said codicil, after the name "Mary Ann Edwards," were struck through; and the figures "£100" were written after the same; and the initial letters "E. A." were written thereunder after the execution of the said codicil; and that such alterations were not executed as is required by law.

The plaintiffs replied, admitting the plea of the defendant so far as it related to the codicil, except they alleged that the figures "£1000," written on the eighth line of the said codicil

after the words "To Mrs. M. C. Marshall," were not written, and formed no part of the said codicil on the said 10th day of March, 1857; and that the figures "1000" were inserted after the execution of the said codicil.

Previous to the filing of the replication Mr. Atherton intervened, but he did not put in any plea.

The only question for the decision of the Court, as settled by the Judge at chambers, was, whether a certain legacy of £1000 to Mrs. Marshall was inserted before or after the execution of the codicil.

1858.

April 28 and
May 6.

SHAWE AND
DICKENS
v.
MARSHALL
AND OTHERS.

Dr. Deane, Q.C., appeared for the executors.

Dr. Phillimore, Q.C., and *Dr. Spinks*, for Mrs. Marshall, M. A. Bulger, and Lucy Makin.

Dr. Twiss, Q.C., for Mr. Atherton.

The Court decreed probate of the said codicil, including the said legacy of £1000 to Mrs. Marshall, and gave to the first three named defendants their costs out of the estate.

Dr. Twiss, Q.C., on behalf of Mr. Atherton, applied for his costs. The plaintiffs at the commencement of these proceedings, by their declaration and affidavit of scripts, ignored the codicil. Mr. Atherton was then entitled to appear to protect his interests; and although by the replication the issue had been subsequently narrowed, this should not affect his right to costs, as he had intervened before it was delivered.

Cur. adv. vult.

SIR C. CRESSWELL: I have endeavoured to ascertain what was the practice of the Prerogative Court with regard to allowing to interveners costs out of the estate. I have come to the conclusion, that by the practice that prevailed in that Court, under the circumstances of the present case I cannot allow more than one set of costs to the defendants. Mr. Atherton, as an intervener, cannot have his costs out of the estate.

1858.

May 18.

In the Goods of RACHEL BAYNE, Spinster (deceased), on
Motion.

In the Goods of
RACHEL
BAYNE.

Chain of Executorship.—Will of feme covert.—Practice.

A limited probate taken out of the will of a *feme covert* will not continue the chain of representation under the general probate of the will of the original testator, but the Court will make a supplemental grant limited to the property which the *feme covert* had as executrix.

Rachel Bayne died in 1799, a spinster, leaving a will dated October, 1798, whereof she appointed Sir Robert Pocklington and Mr. Oliver Cromwell executors, and Martin R. Pocklington residuary legatee. In October, 1799, the will was proved by both executors in the Prerogative Court of Canterbury. Sir Robert Pocklington survived Mr. Oliver Cromwell, and died on the 21st of September, 1840, having made his will, and thereof appointed his wife, Catherine F. Pocklington, sole executrix. In December, 1840, she proved the will in the Prerogative Court of Canterbury, and subsequently intermarried with Sir Henry E. Austen, whom she survived, and died on the 27th of December, 1856, a widow, having during her coverture with Sir H. E. Austen, in virtue of a power reserved to her by her marriage settlement, made a will, and thereof appointed the said Martin R. Pocklington and her brother Edward Blagrove executors. On the 23rd of March, 1857, a limited probate of the said will was granted by the Prerogative Court of Canterbury to the said Martin R. Pocklington, Edward Blagrove having renounced his right to probate. The Bank of England, under advice of counsel, declined to transfer certain moneys into the name of Mr. Martin R. Pocklington as the personal representative of Rachel Bayne, on the ground that the chain of executorship was broken by reason of Lady Austen having made her will during coverture, and a limited probate thereof only having been granted to the said Mr. Pocklington.

Dr. Phillimore, Q.C., submitted that the Bank of England had been rightly advised, and that it was necessary to have recourse to the Court to continue the representation to the original testatrix.

By THE COURT: As a *feme covert* Lady Austen might have made a will of that which she had as executrix?

1858.

May 18.

Dr. Phillimore: Yes; but the difficulty is in carrying on, with the limited probate of her will made under the power, the representation which commenced under the general probate of the will of the original testatrix. In *Barr v. Carter*, 2 Cox C. C. 429, the will had been executed in pursuance of a power given by settlement, but the probate was in the usual general form, and it was on that ground that the Master of the Rolls considered the executrix of that will as a general representative. In *Birkett v. Vandercom*, 3 Hagg. Ecc. Rep. 750, the representation was continued under a limited form.

In the Goods of
RACHEL
BAYNE.

SIR C. CRESSWELL: The limited probate cannot give power to deal with the estate of the original testatrix. You may take a supplemental grant. That will be the most correct mode of proceeding. It will be a supplemental grant of probate, limited to the property which Lady Austen had as executrix.

In the Goods of Sir CHARLES AUGUSTUS FITZROY, Knight
(deceased), on Motion.

May 18.

Execution of Power of Appointment by Will.—Subsequent Marriage.—Revocation.—7 Wm. IV. & 1 Vict. c. 26, s. 18.

In the Goods of
Sir CHARLES
AUGUSTUS
FITZROY.

A. under his marriage settlement had, in the event of his surviving B. (his wife), a power of appointing by deed or will amongst his children certain trust moneys, and in default of such appointment the moneys were to be equally divided amongst them. A. survived B., and by a will executed in 1847, he, being then a widower, (amongst other things) directed the then unappointed portion of such moneys to be equally divided amongst his sons (a portion of such moneys having been previously assigned to his only daughter on her marriage). A., in 1855, contracted a second marriage, and died in 1858 without having executed any other will, or any further appointment of the trust moneys.

1858. **Held**, that the will of 1847, so far as it was an execution of the power
 May 18. of appointment, was not revoked by A.'s second marriage, though
 the same persons would take under the settlement in default of ap-
 pointment, as would have taken in case of an intestacy under the
 Statute of Distributions.

In the Goods of
 Sir CHARLES
 AUGUSTUS
 FITZROY.

The deceased died on the 16th of February, 1858. By an indenture of settlement, bearing date the 9th of March, 1820, and made on his marriage with Lady Mary Lennox, the sum of £17,500 (subject to a deduction of the sum of £2300, as in the indenture mentioned) was assigned to the trustees of the settlement, upon trust to pay the interest thereof to Sir C. A. Fitzroy for life; and after his decease to Lady Mary Lennox for her life; and after the decease of the survivor of them to stand possessed of the trust-moneys and the interest thereof, in trust for such one or more exclusively of the other or others of the children of the marriage, as Sir C. A. Fitzroy and Lady Mary Lennox should, during their joint lives, by deed jointly direct or appoint; and in default of such appointment, or so far as the same should not extend, as Sir C. A. Fitzroy, in case of his surviving Lady Mary Lennox, should by deed or will appoint; and in default of such appointment, upon trust for the children of the marriage in equal shares. There were three sons of the marriage, one of whom died in September, 1855, a bachelor, and a daughter, now the wife of the Hon. Keith Stewart. Lady Mary Fitzroy died in September, 1847, leaving her husband her surviving. Sir Charles and Lady Mary Fitzroy, by indenture bearing date the 9th of August, 1841, assigned the sum of £2000, part of the fund comprised in the above indenture of settlement, for the benefit of their daughter Mary Caroline, wife of the Hon. Keith Stewart. But no further joint appointment was made of the said trust-fund. By his will, dated the 18th of December, 1847, Sir C. A. Fitzroy disposed of various articles of household furniture, personal ornaments, etc., but the last clause was as follows:—"The funded property confided to trustees "under my marriage-settlement in 1820 is, I believe, left at "my disposal (as the survivor), so far as appropriating the "shares to each of my children; but of this fund the sum of "£2000 was settled at her marriage upon my daughter Mary. "The remainder I wish to be divided among my sons, as also

"any other sums of money that I may die possessed of." 1858.
 No executor was named in the will. Sir C. A. Fitzroy, in May 18.
 December, 1855, married Margaret Gordon Hawkey, widow.
 On the deceased's death the above was the only testamentary paper to be found.

In the Goods of
 Sir CHARLES
 AUGUSTUS
 FITZROY.

Dr. Addams, Q.C.: The will is a good execution of the power of appointment of the trust-fund, and if so, would, as far as regards that part of it, fall under the exception in the 18th section of the Wills Act, and remain unrevoked by the marriage of 1855. By the indenture of August the 9th, 1841, Mrs. Keith Stewart has no interest in the fund in the hands of the trustees, except in the £2000 assigned on her own marriage. He moved the Court to decree letters of administration, with the will annexed, to Lady Fitzroy.

SIR C. CRESSWELL: You say, in fact, that the trust-moneys, in default of such appointment, would not pass under the Statute of Distributions, but under the settlement. Suppose there was no will—that Sir Charles had put the will in the fire—the same persons would take in the one case under the settlement, in the other under the intestacy. The question is, whether the exception in the 18th section of the Wills Act applies, the children, in the event of an intestacy, taking under the settlement, and not under the Statute of Distributions, though they are the same parties that would take, and take in the same proportions as if the trust moneys had passed under the statute. I am inclined to think that the exception in this section does apply, and that the will, so far as it disposes of the trust-moneys, is not revoked; and I decree letters of administration, with the will annexed, to the widow.

In the Goods of BIAGIO MANFREDI, deceased, (on Motion).

May 18.

Will in the Registry of the Court.—Practice.

In the Goods of
 BIAGIO
 MANFREDI.

The Court will not allow a will in its custody to be taken out of its jurisdiction on any alleged necessity for the furtherance of justice.

1858.
May 18.

In the Goods of
BIAGIO
MANFREDI

It must presume that other Courts, when satisfied that the original document is withheld by a competent authority, will admit secondary evidence.

Dr. Deane, Q.C., moved the Court to allow the original will of the testator to be delivered out of the registry of the Court under the following circumstances :—The will bore date 1842 ; the deceased died in January, 1845, having been for thirty years domiciled in England. His only property in this country consisted of several pictures and other articles, less in value than £100, but he left considerable property in Bologna. The will and codicil were proved in the Prerogative Court of Canterbury, the property being sworn under £200. The nephews of the deceased had commenced an action against the executor, in the Courts of Bologna. In the first instance, and on appeal, the Courts of Bologna held that they had no jurisdiction. On further appeal to the Court of Rota, at Rome, that Court decided that the Courts of Bologna had jurisdiction, and directed them to proceed in the suit. It was apprehended that the executor would be at a disadvantage in that suit, unless he could produce the original testamentary papers of the deceased. He moved the Court to order the original will to be sent to Bologna, in such manner and on such terms as it should be pleased to direct.

By THE COURT: An application of a similar kind was made last term to send a will to Australia.* I then distinctly said I would comply with nothing of the sort.

Dr. Deane: I rather assumed that your Lordship would reject this motion ; but if so, we would wish to have some

April 28.

In the Goods of
MARY ANN
HOLL.

* In the Goods of MARY ANN HOLL, (deceased), on Motion.

In this case, a question as regarded land in New South Wales was said to be pending in the Court at Sydney under the will and codicil of Mary Ann Holl, which had been made in this country, and were proved and deposited in the Prerogative Court of Canterbury in September, 1849. A commission from the Supreme Court of Sydney to examine witnesses in this country was in the course of execution, and the original will and codicil had been attended with before that commission by a clerk from the principal registry. But it was stated in an

document which we might transmit, showing that the application has been made and refused. 1858.
May 18.

SIR C. CRESSWELL: Perhaps a certified copy of the entry in the Court books would satisfy the authorities at Bologna. Wills in the custody of the Court are open to inspection with a view to prove handwriting. The attesting witnesses are the proper medium of proof of execution of the will. I cannot assume that any Court would allow a suitor to be prejudiced, where the absence of an original document is accounted for by the refusal of a competent Court to part with it.

In the Goods of
BIAGIO
MANFREDI.

affidavit made by the solicitor for the devisees named in the codicil, that at the trial that Court might require the production of the original will and codicil, and might refuse to receive secondary evidence of them. April 28.

In the Goods of
MARY ANN
HOLL.

Dr. Addams, Q.C., moved the Court to direct, "that the original will and codicil of M. A. Holl (deceased) should be delivered out of the registry, upon leaving a certified copy of them, in order that they might be produced at the trial at Sydney, or that the same should be transmitted to the Judge, Registrar, or other official of the Supreme Court, with such directions as the Court should think expedient to insure the safe return of them to the Registry."

SIR C. CRESSWELL totally rejected the motion, observing that he could have no security whatever for the return of the will and codicil from New South Wales; that the regular course in this country was to require the production of original documents, but when a satisfactory reason for their non-production was given to receive secondary evidence of their contents. When the Court had refused to allow the will and codicil to go out of its custody, the Court at Sydney would, he must presume, admit secondary evidence. He had no doubt it would act on the same principle as that followed by the Court of Exchequer in *Alison v. Furnival*, 1 Cr. M. & R. 277. In that case an action had been brought on an agreement deposited with a notary in France, and the Court of Exchequer ruled, that as there was sufficient evidence of an established usage in France not to allow the removal of documents so deposited without an order of a French Court, secondary evidence of the contents of the instrument was admissible. If the execution of the will and codicil were proved under the Commission, and an examined copy of them were sent out to Australia, he had no doubt the Court there would dispense with the production of the originals.

Motion rejected.

1858.

June 26.

In the Goods of
MARTHA
PEACH.

In the Goods of MARTHA PEACH, Spinster, (deceased),
on Motion.

*Execution.—Testamentary Paper.—Dispositive Words
following Testator's Signature.*

A. produced to B. a sheet of paper, having on the first side a formal heading and ending of a codicil, and asked B. to write a codicil for her. B., not having finished the dispositive part when he reached the formal ending, turned over the page and continued the sentence and other dispositive clauses on the second side. The signatures of A. and of the attesting witnesses following the formal ending were on the first page. On motion for probate, counsel suggesting that the writing on the second side might be considered as an interlineation, the Court refused to decide such a question on motion, but left the parties to propound the paper, if they thought fit.

In this case the deceased had made and duly executed her will in 1847; in 1855, owing to the death of certain legatees under the will, she wished to alter it, and, as appeared from the affidavit of John Francis, a friend and neighbour of the deceased, she, with that view, produced to him the form of a codicil; namely, on the first side of a sheet of paper a formal heading, "This is a codicil to the last will and testament of
" me, , bearing date ,"
followed by a considerable blank space; and towards the bottom of the same side of the sheet of paper a formal conclusion, "In all other respects I confirm my said will, and direct
" this to be taken as part thereof. In witness whereof, I have
" hereto set my hand, etc." The attestation clause and the signatures of the testatrix and subscribed witnesses alongside of it, occupied the remainder of the first side of the paper. Francis, from the testatrix's dictation, and using the terms of her will, where he thought them applicable, proceeded to write the dispositive part of the codicil, which he commenced immediately after the formal heading, and continued to the words "in all other respects," when, not having space to finish the dispositive part, he turned over the page and continued the sentence broken off on the first side at the top of the second side of the paper, as follows:—"is to say, I give
" the share of that one who shall first so die to my nephew

" Charles Sharman, and the share or shares of the other or
 " others so dying to my nephews other than the said Charles
 " Sharman, in equal shares. I give all the residue of my pro-
 " perty and effects whatsoever and wheresoever to my said
 " sisters, or such of them as shall be living at my decease, in
 " equal shares, if more than one; and in case my said sisters
 " shall all die in my lifetime, I give such residue to my nieces
 " in equal shares; and I appoint my said three sisters execu-
 " trices of this my will. In witness whereof I have set my
 " hand. I request that all legacies be paid free of duty."
 This extended about halfway down the second side; the paper
 was then duly executed at the bottom of the first side.

1858.

June 26.

In the Goods of
 MARTHA
 PEACH.

Dr. Swabey moved the Court to decree probate of the whole codicil; he submitted that, with the full information as to the facts afforded by the affidavit of Francis, who wrote the paper, the Court might consider that part of the codicil on the second side, which in the ordinary sequence of the paper followed the testatrix's signature (Wills Act Amendment Act, 15 & 16 Vict. c. 24), as an interlineation immediately preceding the testimonium clause on the first side, and, as such, proved to have been there before the execution of the paper, and so entitled to probate.

SIR C. CRESSWELL: I think you have mentioned the only ground on which that part of the paper can be sustained; but you will observe that though the writing on the second side commences in the middle of a sentence, which must be referred to the preceding part on the first side to make sense, yet it continues with a distinct residuary clause, an appointment of executors, and a short testimonium clause. I suppose that part which is written on the second page, and not signed, would not have satisfied 1 Vict. c. 26. This is far too important a question to be disposed of on motion. I must refuse the present motion, and if the parties wish to carry the matter further, they must propound the paper.

1858.

May 31 and
June 26.

In the Goods of JAMES TERRIBLE, (deceased), on Motion.

*Revocation of Will by Marriage.—Memorandum.—Revival
by Codicil.*In the Goods of
JAMES
TERRIBLE.

James T. made a will, giving a life-interest in his property to his wife Sarah. She died, and he subsequently married Martha B. On the day before his death he told an attendant, that he wished the name of his former wife Sarah to be erased in his will, and the name of Martha (his present wife) to be substituted for it, and requested her to write a memorandum on his will to carry out his wishes. The attendant thereupon wrote a memorandum upon the will, which was executed according to the provisions of the Wills Act. The memorandum did not in direct terms refer to the will.

HELD, that the memorandum operated as a codicil to the will, so as to revive the will.

James Terrible died on the 4th of January, 1858. He executed a will on the 11th of June, 1852, whereby he bequeathed (among other things) his real, and the residue of his personal property to his then wife Sarah for her life, and after her death he gave one moiety thereof to her children by a former husband, and the other moiety to his adopted daughter, Mary Lamb, wife of Thomas Lamb, and he appointed his wife Sarah and the said Mary Lamb executrices of his will. His wife Sarah died in November, 1852, and the deceased afterwards married Martha Brewer, whom he left him surviving.

On the morning of the 3rd of January, 1858, (being the day before his death), the deceased, being ill and in bed, sent for his will, and, on the same being brought to him, told Sarah Durrant, the nurse who was attending upon him, that he wanted his other wife's name erased, and his wife Martha's put in, and directed her to write a memorandum upon his will to that effect, in order to give effect to his wishes.

Sarah Durrant thereupon, immediately under the names of the attesting witnesses to the will, wrote these words:—"I give and bequeath to my wife Martha Terrible, my wife Sarah Terrible being void by death;" and read the same to the deceased, who expressed his entire approval thereof, and thereupon made his mark at the foot of this memorandum, in the presence of three persons, who duly subscribed the same as attesting witnesses.

Dr. Tristram moved the Court "to grant probate of this paper writing, as containing the will and codicil of the deceased to Mary Lamb (wife of Thomas Lamb), as the surviving executrix named in the will." He submitted, that though the will had been revoked by the marriage of the deceased subsequent to its execution, the memorandum of the 3rd of January, 1858, was sufficient under the 22nd section of the Wills Act to revive it. The memorandum was clearly entitled to probate. On the face of it, it was not a substantive will, but a codicil to some will; and from its being written on the same sheet of paper, as also from its contents, it could be a codicil to no other will than that of June the 11th, 1852. Its identification as a codicil to that will was sufficient to revive the will. (*Neate v. Pickard*, 2 N. C. 406.)

1858.

May 31 and
June 26.In the Goods of
JAMES
TERRIBLE.

SIR C. CRESSWELL: It is not necessary for me to decide on this motion, whether the effect of the memorandum is to substitute the deceased's widow Martha Terrible as executrix in the place of his former wife Sarah. I will grant probate as prayed.

In the Goods of ELISHA PECK (deceased), on Motion.

In the Goods of
ELISHA PECK.

Creditor.—Appointment of Guardian.—Insolvent Estate.—Administration.

A creditor appointed guardian to minors (the only children of E. P.), who had no known relations, for the purpose of taking out administration to the estate of E. P., who had died intestate and insolvent.

Elisha Peck died on the 5th of June, 1857, intestate and insolvent, a widower, leaving three children, all minors, the eldest being of the age of thirteen years.

The deceased left personal effects under the value of £100, and debts to the amount of £180. His principal creditors were F. Newman, to whom he owed £150, and J. Woodford, to whom he was indebted in the sum of £15.

The minors had no natural guardian, as the deceased was illegitimate, and there were no known relations of their mother. On the death of the deceased, J. King, a brother

1858. of the natural father of the deceased, took possession of his
May 31 and dwelling-house and effects, and promised to assist the said
June 26. J. Woodford, as one of the creditors, in becoming adminis-
In the Goods of trator; but he subsequently prevented the eldest minor from
ELISHA PECK. signing a paper electing J. Woodford guardian, and had re-
fused to administer himself, or to allow any one else to do so.
He had disposed of a considerable portion of the effects of the
deceased, without paying any of his debts. It was the general
desire of the creditors that administration should be granted
to F. Newman.

The above facts were deposed to in a joint affidavit made
by F. Newman and J. Woodford.

Dr. Tristram moved the Court, under sect. 73 of the Pro-
bate Act, "to grant administration of the effects of the
"deceased to F. Newman, on his exhibiting an inventory of
"the effects, and giving justifying security." F. Newman
would undertake to distribute the property of the deceased
rateably amongst the creditors.

SIR C. CRESSWELL: I have an objection to granting your
motion under the 73rd section of the Probate Act. I think,
before granting it, the minors, or some one in the character
of their guardian should be cited. The better course would
be for the Court to appoint a guardian to them, and you
can then cite him. I incline to think that Mr. Kinger would
be the most proper person to be appointed their guardian for
that purpose. Let the motion stand over.

June 26. *Dr. Tristram* now moved the Court to "appoint F. Newman
"as guardian to the minors, for the purpose of his taking
"upon himself letters of administration of the personal estate
"of the deceased for the benefit of the minors, and until one
"of them should attain the age of twenty-one years, and to
"decree letters of administration to be granted to him ac-
"cordingly." The Court had on a previous day intimated
that Kinger would be a proper person to be appointed guar-
dian, but there were strong objections to his appointment. His
conduct in respect to the estate, as detailed in the affidavit,
had been most improper. His appointment might enable him

to defeat the very object of the present application, which was to secure the property for the creditors. [By THE COURT : It would have been more satisfactory, if other creditors had joined in the affidavit.] The estate of the deceased is under £100, his debts amount to £180, and he appeared for two creditors, whose united claim amounted to £165. Kinger, not being by law related to the minors, had no special claim to be their guardian.

1858.

June 26.

In the Goods of
ELISHA PECK.

SIR C. CRESSWELL : Under the circumstances of the case, I will appoint F. Newman guardian to the minors, for the purpose of taking out administration.

COOPER AND SPARKS v. MOSS AND MOSS.

COOPER AND
SPARKS

20 & 21 Vict. c. 77, s. 38.—*Place of Trial.—Practice.*

v.
MOSS AND
MOSS.

Application on behalf of the plaintiffs to direct a cause to be tried at the coming assizes at Derby, refused. There is no similarity between the position of a plaintiff here and his common law right to lay the venue where he pleases. A testamentary suit is at large, and ought to be tried before the Judge in the Court of Probate, though he has a discretionary power to send an issue to be tried before a Judge of Assize.

Dr. Robertson applied to the Court to direct this cause to be tried at the coming assizes at Derby. He relied on the affidavits of the plaintiffs, the executors named in the testamentary paper in dispute, which set forth the residence of the testator and other parties concerned for forty years in Derby ; that the bulk of their witnesses were in Derby, or close by ; that great expense would result from bringing them to London ; and that the real estate disposed of by the will was in the county of Derby, and a few miles off, in Staffordshire.

Dr. Phillimore, Q.C., *contra* : The opposition to this will is founded chiefly on the undue influence alleged to have been exercised on the mind of the testator by a dissenting minister of considerable reputation in Derby. The cause has created

1858.
June 26.
—
COOPER AND
SPARKS
v.
MOSS AND
MOSS.

much discussion in Derby, and it is therefore not desirable that it should be tried there. As to the expense, if a day can be fixed to try the case in this Court, it cannot be much increased by the witnesses coming to London.

SIR C. CRESSWELL: The party making this application is not in the situation of a plaintiff at common law, who would have had a right to lay his venue in Derbyshire. The cause properly belongs to this Court, and should be tried here. Special powers are, however, given to the Court to exercise a discretion in this respect, and to direct the issues joined to be tried either before a Judge of Assize in any county, or at the sittings for the trial of causes at London or Middlesex (20 & 21 Vict. c. 77, s. 38). Without saying anything to the prejudice of Derby, as the cause arose there, and probably has been the occasion of a good deal of discussion and feeling on the spot, I do not think it would be a discreet exercise of my power to send it for trial there. There is no other assize town near to Derby where it could be conveniently sent for trial. It must therefore remain in London, and some day certain can be fixed in due course for its trial in this Court.

Application refused.

June 26 & July
18.

In the Goods of JOSEPH RAINE (deceased), on Motion.

Joint Will.—Application for Probate.

In the Goods of
JOSEPH RAINE.

A. and B., partners in a farming business, and joint tenants in certain freeholds, executed a will containing various devises and bequests, to take effect after the decease of both of them. On the death of A., B. surviving, application for probate as of the will of A. was made by the executor therein named.

HELD, that probate could not be granted of such an instrument, till after the death of both the parties.

This was a question of granting probate of a testamentary paper made in the following terms:—

“In the name of God, amen. We, Joseph and Charles Raine, farmers, of Holwick, in the parish of Romaldkirk, in the county of York, do hereby make and ordain this our

"last will and testament in manner and form following, that 1858.

"is to say—

June 26 & July
18.

"1. We give and bequeath to our nephew, Charles Raine,
"the sum of £5, to be paid to him at the expiration of twelve
"calendar months after both our decease: and also the like
"sum of £5 to our sister Jane Raine, to be by our executor
"hereinafter named paid to her twelve calendar months after
"both our decease.

In the Goods of
JOSEPH RAINE.

"2. We give and bequeath to James Raine, our nephew,
"all our personal property, or the residue thereof, whatsoever
"and wheresoever, consisting of goods, chattels, farming-stock
"and crop, husbandry and dairy utensils, joiners' tools, money
"and credits to the said James Raine, to take possession of the
"same immediately after both our decease.

"3. We give and devise to James Raine, our nephew afore-
"said, our dwelling-house, situated at Middleton Town Head,
"with all the appurtenances thereto belonging or appertaining,
"now occupied by Ralph Atkinson; we also give and devise
"to our nephew, James Raine aforesaid, our allotment, if not
"sold during our lifetime, situate on Middleton outer pasture.
"He, the said James Raine, to take possession of the said
"house and allotment immediately after both our decease,
"and to have, hold, and enjoy the same, him and his heirs, ex-
"ecutors, administrators, and assigns for ever; and we hereby
"nominate, appoint, and ordain James Raine, our nephew
"aforesaid, sole executor of this our last will and testament.

"In witness whereof we hereby set our hands and seals this
"14th day of April, 1855.

"Signed, sealed, and declared in
"the presence of us, and we in the
"presence of each other, by the
"testators, Charles and Joseph
"Raine, as their last will and tes-
"tament.

WILLIAM HOULDEN.
PHILIP RAINE.

"JOSEPH RAINE, his X sign (L. s.)
"CHARLES RAINE. (L. s.)"

Joseph Raine died on the 24th of August, 1856. The de-
ceased and his brother were in partnership as farmers, and
joint tenants of certain freeholds. The only property of which
Joseph Raine was possessed, not included in the partnership,

1858. was worth about £10. An affidavit of Charles Raine, the surviving brother, set forth all the circumstances of drawing the will and its execution.

In the Goods of
JOSEPH RAINE.

Dr. Wambey moved the Court "to decree probate of the will "of the said Joseph Raine, deceased, to be granted to James "Raine, the executor therein named." *Hodson v. Blackburn and Blackburn*, 1 Add. 274, was an authority against mutual wills. But *In the Goods of Sir Josias Henry Stracey and Diana Stracey his wife*, 1 Deane 6, Sir John Dodson had distinguished between joint and mutual wills, and granted probate of an instrument very similar in terms to the present one. *Cur. adv. vult.*

July 18. SIR C. CRESSWELL: This was an application for probate of a very singular instrument. Two persons profess to make their will, and neither gives anything without the other; and the instrument is to have no effect till after the death of both. It is distinguished from the cases referred to: it is not a mutual will, which purports to leave to the survivor of one or more parties the property of the other; nor is it such an instrument as that *In the Goods of Stracey*, calling itself a joint will, where the husband and wife disposed of separate properties, over which they had respectively powers of appointment. I cannot grant probate of this paper during the life of either.

In the Goods of
JANE ELIZABETH
CRAUSE.

In the Goods of JANE ELIZABETH CRAUSE (deceased),
on Motion.

Administration.—Husband and Wife deceased.—Husband's next of Kin.

Where the husband has survived the wife and died intestate, without administering to her estate, his next of kin must constitute themselves his legal personal representatives, before they have any claim to administer to the wife's estate.

The deceased in this case married Major Jackson Crause in 1830; there was one child of the marriage, who died in

the lifetime of both the parents. Jane Elizabeth Crause died 1858.
 in November, 1836, being then entitled to a fifth share of a June 26 & July
 sum of Consols, expectant upon the death of her mother, Ann 18.
 Green. Major Jackson Crause left England in 1839, and, as In the Goods of
 appeared from the affidavit of his father, Mr. Charles Crause, JANE ELIZA-
 had not been heard of since 1841. Ann Green, the mother, BETH CRAUSE.
 of Jane E. Crause, died in 1854, when the sum of Consols be-
 came divisible.

Dr. Twiss, Q.C., moved the Court to "decree letters of ad-
 "ministration to the personal effects of Jane E. Crause to Mr.
 "Charles Crause, as the father and next of kin of Major Jack-
 "son Crause." It had been suggested in the Registry that the
 father should first take out administration to the son, and then,
 as his representative, administer to the estate of the deceased.

But in *Fielder and Fielder v. Hanger*, 3 Hagg. Ecc. Rep. 770,
 Sir John Nichol said: "On principle, however, that the grant
 "ought to follow the interest, and that the whole interest is
 "vested in the husband's representatives, I shall decree this
 "grant. I should have done the same if the husband had
 "not taken out administration, unless it could be shown that he
 "had no interest, but that the property belonged to the wife's
 "next of kin. And it will be understood in the Registry that
 "this is to be the rule for the future, unless special cause to
 "the contrary be shown."

SIR C. CRESSWELL: I am informed that it never has been
 the practice to make such a grant directly, as you are now
 asking it, and it is rather a grave question as regards the
 revenue and the Chancellor of the Exchequer.

Cur. adv. vult.

SIR C. CRESSWELL: I have looked at the case cited, but July 13.
 that bears on the beneficial interest of the representatives of
 the husband or the wife, and does not meet the difficulty of
 the present case, which is, that the father of the husband,
 till he has legally constituted himself his personal representa-
 tive, can have no claim whatever to the personal estate of the
 wife. I must uphold the practice as stated in the Registry,
 and refuse this motion.

Motion refused.

1858.

June 8.

BELBIN
v.
SKEATS.

BELBIN v. SKEATS.

*Will.—Proof of Execution.—Examination of one of the
Attesting Witnesses sufficient.*

To prove the execution of a will in the Court of Probate, it is not necessary to examine both the attesting witnesses.

Probate in common form had been granted by the Prerogative Court of Canterbury of a paper professing to be the last will of Moses Hebbard, deceased, and dated the 1st day of July, 1856, to Horatio Ward and Robert Skeats, the executors named therein.

The present suit was instituted by the plaintiff (Jane Belbin), the executrix of a will of the deceased of prior date, with a view to obtain revocation of such probate.

Dr. Phillimore, Q.C., and Mr. Denman, for the plaintiff.

Dr. Deane, Q.C., and Mr. Coleridge, for the defendant.

Both the attesting witnesses to the will of July the 1st, 1856, viz. J. Phillips and John Ward, were examined on behalf of the defendant to prove its due execution. John Ward was a witness hostile to the case set up by the defendant.

Dr. Deane, Q.C. (to the Jury) : The evidence given by John Ward on his cross-examination was no doubt prejudicial to the case of the defendant, one of his own witnesses; but he was not his witness by choice; the defendant was compelled to produce him, as one of the attesting witnesses to the will to prove its due execution.

SIR C. CRESSWELL : I think not.

Dr. Deane : By the practice of the Prerogative Court, both the attesting witnesses to a will were required to be produced by the party seeking to prove its execution.

SIR C. CRESSWELL : The question does not arise here, but

whenever it does arise, I shall most unhesitatingly rule that it is not necessary to call both the attesting witnesses to prove the execution of a will. This is purely a question of evidence, and by 20 & 21 Vict. c. 77, s. 33, the rules of evidence observed in the Courts of Common Law are to be observed in this Court in the trial of all questions of fact. It must be governed, therefore, not by the practice of the Prerogative Court, but by the rules of evidence observed in the Courts of Common Law. In those Courts the execution of a will may be proved by calling one only of the attesting witnesses. In *Wright v. Doe dem. Tatham* (1 Ad. & Ellis) 3, which was an action of ejectment brought by the heir-at-law against a devisee claiming under a will made prior to the passing of the Wills Act, the Exchequer Chamber held that to prove the execution of a will it was sufficient to call one only of the subscribing witnesses, if he could speak to the observance of all that was required by the statute. The authority of that case has never been disputed.

1858.

June 8.

BELBIN
v.
SKELTON.

PALMER v. MACLEAR AND M'GRATH.

*Proof of Will in Solemn Form.—Several Defendants.—
Counsel.—Evidence.—Practice.*

PALMER
v.
MACLEAR
AND
M'GRATH.

Where an executor propounds a will in solemn form, and there are several defendants whose case on the pleadings is substantially the same, the Court will hear counsel only for one defendant.

The opposite counsel cannot inspect letters which a witness has with him during examination, though they relate to the cause, without putting them, if required by the other side, in evidence.

This was a case of proving in solemn form of law the will and codicil, dated respectively the 29th day of August, and the 13th day of October, 1854, of Sir George M'Grath of Plymouth, Knight, K.C.C., etc., M.D., deceased, promoted by Mary Elizabeth Palmer, one of the executors named in the said will, against Mary Maclear, the sister and sole next of kin of the deceased.

1858. The will and codicil were propounded in a declaration in
June 8. the usual form.

—
PALMER
v.
MACLEAR
AND
M'GRATH.

To this Mrs. Maclear pleaded: 1st. That the deceased, at the respective dates of the execution of the will and codicil, was of unsound mind. 2nd. That their execution had been procured by undue influence.

After the issue had been delivered, the heir-at-law of the deceased (John C. M'Grath) was cited, and the declaration was delivered to him. He put in pleas similar in effect to those given in by Mrs. Maclear, and in addition thereto denied the due execution of both the will and codicil.

The Queen's Advocate (Sir J. D. Harding) and Mr. Skinner, Q.C., appeared for the plaintiff.

Mr. Collier, Q.C., and Dr. Phillimore, Q.C., for the next of kin.

Dr. Deane, Q.C., for the heir-at-law.

SIR C. CRESSWELL: There are two defendants in this case. A question arises, whether they are entitled to be heard separately by counsel.

Dr. Deane, Q.C., appeared for the heir-at-law. He went a little further in his pleadings than the next of kin. There was one point raised by the heir-at-law, which was not raised by the next of kin, viz. as to the due execution of the will and codicil.

SIR C. CRESSWELL: The case is substantially the same on the pleadings on behalf of both defendants. I shall hear counsel only for one defendant. That is the rule, which has been established by the Court of Queen's Bench.

W. L., the drawer of the will and codicil, was then examined on behalf of the plaintiff. This witness, during his examination, held in his hand notes which he had made from his day-book to refresh his memory, together with certain letters, which had reference to the subject of inquiry.

Mr. Collier (to the witness): Are you referring to the notes which you say you made to refresh your memory, or to some other papers? Hand me those papers.

1858.

June 8.

PALMER

v.

MACLEAR

AND

M'GRATH.

SIR C. CRESSWELL: You may look at the notes made by the witness to refresh his memory; but you cannot look at the letters without putting them in evidence, if required by the plaintiff.

HARVEY v. ALLEN.

June 9 and 26.

Proving Will in Solemn Form.—Compromise.—Jurisdiction of Court of Probate.

HARVEY

v.

ALLEN.

In a cause of proving a will and codicil in solemn form, promoted by the executor against the legal personal representative of the sole next of kin of the deceased, a compromise having been agreed to, by which a verdict establishing the will and codicil was to be taken by consent for the plaintiff, and the defendant was to receive £2000 out of the estate:

Held, that the Judge of the Court of Probate had jurisdiction to make the terms of the compromise a rule of Court, and to enforce it as such. Probate of the will and codicil was decreed to the plaintiff, as executor, the terms of the compromise being embodied in the decree.

This was a cause of granting letters of administration, with the will and codicil, bearing date respectively the 21st day of July, 1855, annexed, of Mary Carter, late of Brook Terrace, Old Kent Road, in the county of Surrey, deceased, promoted by William Godfrey Harvey, a legatee therein named (the executor appointed in the said will having renounced probate of the said will and codicil), against Ann Allen, wife of John Lucas Allen, the legal personal representative of the sole next of kin of the deceased.

During the hearing of the cause before Sir C. Cresswell and a special jury, a compromise was agreed to by the counsel on both sides, and the following memorandum, containing the terms of the compromise, was subsequently signed by the plaintiff and the defendant: "Amount of property, £7700. "Verdict for the plaintiff establishing the will. Plaintiff

1858. "undertaking to pay the defendant upon receipt of the
June 9 and 26. "money the sum of £2000. Each party to pay their own
"costs."

HARVEY

v.

ALLEN.

June 26.

Dr. Deane, Q.C., moved the Court to decree letters of administration, with the said will and codicil annexed, to the plaintiff, in conformity with the compromise agreed to.

There had been some difficulty in carrying out the compromise. The plaintiff (Mr. Harvey) would not take under the will a sufficient sum to pay the defendant's £2000. This difficulty had been got over; for since the jury were discharged two of the plaintiff's children, who were of age and were legatees under the will, had become parties to the compromise, and had agreed to make their respective shares chargeable in equal proportions for the above sum.

Mr. Collier, Q.C., *contra*: Both parties are anxious to carry out the compromise. He objected, however, to the grant of administration passing to Harvey, by which he would be put in possession of the whole of the deceased's property, and the defendant would have no security for ever getting the £2000 agreed to be paid to her. If the plaintiff declined to give her security, the Court has power to grant the defendant administration under sect. 73 of the Probate Act; or administration *pendente lite* under sect. 70. [BY THE COURT: I don't see how I can duly exercise such power in the present case.] Until judgment is signed, the *lis* will be *pendens*. [SIR C. CRESSWELL: I don't see how that can be; but I don't say that I am deprived of all authority in the matter.] The jury were discharged, subject to this: that if the parties did not agree, another jury would be summoned to try the case.

SIR C. CRESSWELL: There is another ground upon which I might interfere. By the 37th section of the Probate Act, when I try questions before a jury in this Court, I have the same powers, jurisdiction, and authority as belong to a judge sitting at *Nisi Prius*. Let the terms be embodied in the order I make. The Court can then enforce them as an order, or rather as a rule of Court, just as an order is made by a judge

at Nisi Prius, which the Court will enforce. The better way would be, that I should decree a grant of administration, with the will and codicil annexed, to the plaintiff; that the decree should recite what has been done, viz. that by consent the jury were discharged; that by consent administration, with the will and codicil annexed, had been decreed; that the plaintiff is to pay the £2000 to the defendant out of the first moneys which he receives under the will. Each party to pay their own costs.

Decree accordingly.

1858.

June 26.

HARVEY
v.
ALLEN.

HARRIS v. BERRALL.

July 23 and 24.

Will.—Revocation.—Insanity.—Onus Probandi.

HARRIS
v.
BERRALL.

A., having duly executed her will, subsequently became insane. Shortly before her death, it was discovered that the will had been mutilated by her; but it was proved to have been in her custody for a short time subsequent as well as prior to her insanity.

Held, that there being satisfactory evidence of the due execution of the will, the *onus* of showing that it had been mutilated by the testatrix when of sound mind was upon the party alleging its revocation.

This was a question as to the revocation of the will of Eliza Berrall, who died in February, 1857. The plaintiff, Mrs. Harris, had applied for a grant of administration to the effects of the deceased, alleging that she had died intestate, and that she was her sole next of kin, and the only person entitled in distribution to her personal estate.

The defendant entered a *caveat* against the grant, and propounded for probate a paper in the handwriting of the deceased, purporting to be her last will, and which had been found amongst her papers in January, 1857 (the month before her death), with the bottom of the third page, where the deceased and the attesting witnesses were supposed to have signed their names, cut off.

The alleged will was dated the 8th of April, 1851. The deceased, as admitted by the plaintiff, became of unsound

1858. mind on the 11th of September, 1852, and so continued up to July 22 and 24. the time of her death, in February, 1857.

HARRIS . In July, 1853, she was found, by a commission of inquiry,
 v. of unsound mind from the 11th of September, 1852. Mrs.
BERRALL. Harris, the plaintiff, was then appointed committee of her person, and thereupon took into her custody the box in which the will was subsequently found.

It appeared, by the evidence, that from the 11th September, 1852 (the date of the deceased's insanity), up to July, 1853, or at any rate during some part of that interval, the will was in the deceased's custody, but that from July, 1853, up to the date of her death she had no access to it.

Dr. Deane, Q.C., Dr. Tristram, and Mr. Quain appeared for the plaintiff.

THE QUEEN'S ADVOCATE (*Sir J. D. Harding*), *Dr. Spinks*, and *Mr. Ayrton*, for the defendant.

Dr. Deane, for the plaintiff, submitted that the onus of showing that the deceased had torn the will during the time she was insane, and had access to it (viz. between the 11th of September, 1852, and July, 1853) lay upon the defendant; that it did not appear, upon the balance of the evidence, that it had been mutilated during that interval, and that, if that were so, the presumption would be that the will was torn prior to the commencement of her insanity.

SIR C. CRESSWELL on this part of the case observed: I am satisfied that this will was duly executed. Upon the evidence I think it remained in a perfect state until the deceased became insane, and that it was torn by her during her insanity.

But if there had been no evidence to fix one time or another for its mutilation, I still think that it would have been entitled to probate. By 1 Vict. c. 26, every will is required to be executed as therein prescribed. If it is once proved that a will has been duly executed, I hold that it is entitled to probate, unless it is also shown that it has been revoked by one of the several modes pointed out by that statute; and

I am of opinion that the burden of showing that it has been so revoked lies upon the party who sets up the revocation. 1858. July 22 and 24.

HARRIS
v.
BERRALL.

One of the modes of revocation pointed out by the statute is tearing with an intention to revoke; but an insane person cannot be said to have any intention. The will in this case was in the custody of the deceased at the time she was of unsound as well as of sound mind. Shortly before her death it was discovered to have been torn by her. The burden of showing that it was not done after she became insane, but at a time when she was of sound mind, is cast upon the plaintiff, who sets up the revocation of the instrument.

Probate granted.

ELMS v. ELMS.

July 21 and 26.

Will.—Revocation.—Intention.—Act to carry into effect. ELMS v. ELMS.

A., having previously expressed his intention to make a new will, and leave all his property to the principal legatee in the existing will, sent for the will and tore it almost in two, but was stopped by the exclamations of persons in the room as to the danger of destroying the existing will before making another. A. let the will fall on the ground, but in a few minutes picked it up and refused to burn it; it was replaced in his drawers upstairs, and a few days afterwards, being about to sail for India, he burnt certain papers, but not the will, to which his attention was at that time drawn; he afterwards showed a paper, which he called his will, to the principal legatee. He sailed for India, still expressing his intention of making a new will; after his death the torn will was found in the house in Wales in which he had been staying.

Held, that in order to revoke a will by tearing, it is not necessary to rend the will into more pieces than it originally consisted of; but that it is sufficient if the testator intended the tearing actually done of itself to work a revocation, without any further act;

That there being satisfactory evidence that the paper had been duly executed, and no evidence to prove that, by partial tearing, the testator had carried into effect the original intention he had had to revoke the instrument, it was entitled to probate.

1858. This was a question as to the intention and fact of revocation
 July 21 and 26. of the will of Lieut. Jacob.

ELMS v. ELMS.

The case was argued by the QUEEN'S ADVOCATE (*Sir J. D. Harding*), *Dr. Spinks*, and *Mr. J. D. Welsby* for the legatee.

Dr. Phillimore, Q.C., and *Mr. Coleridge* for the next of kin.

The facts are fully and minutely stated in the evidence of witnesses, as recited in the judgment. As regards the instrument in question being found by Cox in his drawer after Lieut. Jacob's death, it was suggested that the testator, being a man of intemperate habits, had left the will in the pocket of Cox's mackintosh, which he wore when he took leave of Miss Elms, and showed her what he called his will; and that Cox, after Lieut. Jacob had left London for Southampton and India, carried it back with him in the mackintosh to Wales without being aware that it was there. *Cur. adv. vult.*

July 26.

SIR C. CRESSWELL: This was a question as to whether Lieut. Jacob, late of the Madras Native Infantry, left a will or died intestate. It was admitted on both sides, and on the record, that the deceased in 1856 made a will, which was duly executed as required by 1 Vict. c. 26. But it was alleged by the defendants that he afterwards revoked that will, and that it never was revived. At the hearing of the case there was some discussion as to the party upon whom the *onus probandi* was cast. On that subject the remarks of Lord Brougham in *Waring v. Waring*, 6 Moore, P. C. 355, are well worthy of attention: he there says: "The burden of proof often shifts
 "about in the progress of the cause accordingly as the successive steps of the inquiry, by leading to inferences decisive until
 "rebutted, cast on one or the other party the necessity of protecting himself from the consequences of such inferences; nor
 "can anything be less profitable as a guide to our ultimate judgment than the assertion, which all parties are so ready
 "to put forward in their behalf severally, that in the question
 "under consideration the proof is on the opposite side."

Adopting that view of the subject, I will proceed to consider the whole of the evidence in this case, and endeavour to

ascertain whether the will, which Lieutenant Jacob made in 1856, was afterwards revoked by him or not. The will, as brought into the registry, was written on five sheets of paper, which were attached together by tape at the upper left-hand corner; it appeared to have been folded up in the ordinary form of a brief; it appeared also to have been half-opened, so that the sheets, when attached, were doubled only with the top and bottom edges brought together, and that all the sheets had been torn at the same time from the edge very nearly through, so that only a small portion of each sheet, where it was doubled, held the two parts together; but no one of them was entirely torn through, so as to divide it into two portions. The manner in which it was reduced to that state was not left to conjecture or presumption. Positive evidence was given. It was torn by the deceased, not by accident or mistake, but by design, and the question is, whether he intended to revoke it by so tearing it. The statute 1 Vict. c. 26, s. 20, amongst other modes of revoking wills, mentions "tearing by the testator with the intention of revoking the same." Now, by tearing, I do not understand the Legislature to have meant that the testator must rend the will into more pieces than it originally consisted of; and therefore, although no one sheet of paper was completely divided, I think the tearing might be sufficient to revoke, if done with that intention. But, in order to make it effectual, he must have intended to revoke by so tearing it; by which I mean, that he must have intended that which he actually did of itself to have that effect without more. In one sense it may be said that he tore the will with the intention to revoke it, for no doubt he had that intention when he began to tear, and as soon as he had torn it a quarter of an inch he had torn it with intention to revoke; but he did not intend to revoke it by that tearing only, he intended to tear further.

And this brings me to the same question that was considered in *Doe v. Perks*, 2 B. & A. 489. When he ceased tearing, had he done all that he contemplated doing for the purpose of revoking? If he had, the revocation was complete, and he could not recall his act; he could only recall the will by some of the means prescribed by the 22nd section of the Wills Act, which he certainly did not adopt. But in order to decide

1858.

July 26.

ELMS v. ELMS.

that this will, which was duly made, was afterwards revoked, I ought to be satisfied that the testator did all that the statute makes necessary to work a revocation, viz. that he tore it, meaning by that act without more to revoke it. And here I must refer to some of the evidence given in the cause.

According to Mr. Cox, (who was acquainted with the deceased at Caernarvon, and in whose house the deceased was from time to time staying,) it appears they were in London together in October, 1856, when the deceased told Cox that he had ordered his solicitor, Mr. Few, to obtain the will from Major Watson, in whose custody it was. Subsequently, in the same month, the deceased received a letter from the post-office at Caernarvon, containing the will. He was then staying at Cox's house. He desired Cox to read the will, and to take care of it for him; Cox accordingly put it in a drawer, and he says it was then in a perfect state. "In May, 1857," Cox says, "we arranged to come up to London together; he told me to put the will in his portmanteau; he told me he was going to make a new will, and that he wished to leave all his money to Miss Elms, and that he should instruct Mr. Few to make one." It appears, however, that circumstances prevented the new will from being then made, and Cox brought back the existing will to Caernarvon, where they returned on the following day. Cox continued: "In June, 1857, the deceased received orders to go to India. I again came up to London with him. Nothing was then said about the will. We stayed two or three days in London, and then returned to Caernarvon. The deceased said he came up to make some arrangements about going out to India. I remember the 14th of August. The deceased had been drinking almost a pint of brandy that morning. He was on the sofa. He asked me to go up and fetch his will out of his portmanteau. I did so. As soon as he had it in his hand he ripped it, tore it; as soon as I saw what he was doing, I said, 'Stop, don't do that'—(he did stop); 'if you do so, Miss Elms won't take a penny of your money unless you make another will; and as it is, she will get the greatest part of it.' He said, 'Oh, I shall make another will when we are up in London; I wish her to have it all.' I said, 'If you wish to destroy the will, you had better burn it.' 'No,' he

"said, 'you burn it.' I said, 'No, I could not do it.' I 1858.
 "then asked if he wished to burn the will. He said, 'No, I July 26.
 "shan't.' I then said, 'I'll take it upstairs.' I did so; he ELMS v. ELMS.
 "knew that I took it upstairs." In answer to some questions
 which I put, the same witness said, "When he tore it, he
 "either gave it me, or I picked it up off the floor; I can't
 "speak positively; I thought he picked it up; he was on the
 "sofa; he did let it fall out of his hand on the floor; the
 "will was in his hand when I said, 'Stop, don't do that;' it
 "was on the instant. I said it would be time enough to
 "destroy that when he had made another; it was all done at
 "one tear." He further said: "Mrs. Cowlshaw was in the
 "room at the time; the deceased left my house on the 16th
 "of August,—on a Sunday; I went with him to London; we
 "got there on the 17th, and again stayed at the Cross Keys;
 "on the 18th we went to Horsham; the deceased said he went
 "to Horsham to bid Miss Elms good-bye; he saw her; he
 "borrowed my mackintosh; I returned to London with him
 "that day; he told me he had seen her; he seemed very
 "much distressed; he never went out of the Cross Keys till
 "Wednesday evening, when he started for Southampton; I
 "don't know of his having the will with him when he
 "went to Horsham. In September, 1857, I found the will
 "in my drawer; I received a letter from Mr. Few to ask
 "if the deceased had left any papers behind with me; he
 "had burned all the other papers he wished to destroy
 "the day before we last started for London; when we came
 "to the will I said, 'Here's the will, Jacob;' he said, 'I
 "shall make another will when I go to London;' I put
 "the will in the drawer in his room. When Mr. Few wrote
 "to me I went to find the will, and it was in the drawer
 "in our room; I forwarded it to Mr. Few; I do not know
 "how it came in the drawer where I found it." On cross-
 examination the witness gave the same account. He added:
 "When I came back from Horsham with Lieutenant Jacob,
 "I reminded him that he should make another will; he
 "said, 'I shall, but I have not time now; if I am taken
 "ill on board ship I shall be sure to make my will; I should
 "speak to the captain.'" Mrs. Cowlshaw, a married sister
 of Cox, who was staying in his house on the 14th of August,

1858. says: "I remember being in the kitchen in company with
July 26, "Lieutenant Jacob and Mr. Cox; my husband was in an ad-
ELMS v. ELMS. "joining parlour; Lieutenant Jacob said to Cox, 'Cox, fetch
"my will down;' Cox brought it and gave it to Mr. Jacob;
"Jacob was lying on the sofa at full length; he took the will
"and appeared as if he would tear it then; he did begin to
"tear it, and I said, 'Stop;' he tore it a little more; I said,
"'Pray, do stay.' Cox also said, 'Don't mutilate it like
"that, Mr. Jacob; Miss Elms won't get a penny of your
"money;' he was going to tear it still further, when I said,
"'Pray, don't,' and he ceased; he let it fall on the floor;
"he was still at full length on the sofa; in a few minutes he
"rose, picked it up, and said, 'I will take it to Cowlishaw
"then, to read; he will like to read it.' He then went into
"the parlour, and took the will with him." Mr. James
Cowlishaw, the husband of the last witness, said: "I was
"staying at Cox's in August, 1857. I knew Mr. Jacob
"there; he frequently spoke to me about his will; he said he
"intended to destroy that will and make another, and leave
"the whole of his property to Miss Elms; that he intended
"Major Watson's daughter not to have the £1000 he had
"left her. He said he should not leave his brother and sisters
"anything. On the 14th of August I was sitting in the par-
"lour reading; my wife and Mr. Cox were in the kitchen.
"Mr. Jacob came into the parlour, followed by Cox; he said
"to me, 'Cowlishaw, there is my will; read it.' I did so far
"that I could ascertain to whom he had left his money; he
"had left a legacy of £1000 to the little girl, and the whole
"of the rest to Miss Elms. I handed it back to him; he
"said, 'I mean to destroy this, and make another in favour of
"Miss Elms.' Myself and Mr. Cox said, 'If you leave it in
"this mutilated state, there will be a bother about it.' Mr.
"Cox suggested to put it in the fire in the back kitchen.
"Jacob asked me to do so. I said, 'No, it is a serious mat-
"ter: I can't interfere.' Lieutenant Jacob refused to burn
"it, and Cox said, 'Well, Jacob, if you won't destroy it, I'll
"take it upstairs again.' He did so. Jacob had been drink-
"ing that morning brandy; he was not drunk, he knew what
"he was doing." Miss Elms deposed: "I remember his
"coming down on the 18th of August before he went to

"India. I saw him; he said he was going to sail; he produced a paper from the pocket of the coat he had on; he said it was his will. He partly opened it, and showed part of the writing; I think I saw my name, but am not sure. I did not see his signature; he said it was a will made in my favour, and wished me to keep it. I refused. I did not observe whether it was torn; he opened it very partially." (On the will being shown to the witness,) "It is the same colour as the paper I saw; it was doubled up; I thought it was a journal when he produced it." The act of dropping or casting it on the floor was no doubt relied on in consequence of the *dictum* of Best, J., in *Doe v. Perks*; but the learned judge must not be supposed to have ascribed to the act of throwing the torn will on the floor any other operation than that of showing that he had done all that he intended to do. But there his hand had been arrested, and if I am to place implicit reliance on Mrs. Cowlshaw's evidence in this case, the testator was about to tear further, when she stopped him; the appearance of the paper confirms that. He had torn the will so nearly through, that one cannot but conjecture that he meant to effect a severance of the parts; but that remained unaccomplished, and I find nothing in the case upon which I can assume any other state of facts than that which Mrs. Cowlshaw describes. Her memory may be imperfect; but assuming it to be so, what other evidence have I before me? By what testimony has any other state of things been established? The brother's evidence is not quite so full, but it leads to the same conclusion.

I do not place reliance on what passed afterwards,—viz. that when he burnt other papers, he preserved the will, and that he showed it to Miss Elms as his will. If it had appeared that he knew that the will once torn with intention to revoke was thereby revoked, the preservation and subsequent exhibition of it to Miss Elms would have tended to show that he knew it had not been revoked, or in other words, that his hand had been arrested in time, and that he had never completely revoked; but he very probably supposed that, as long as no parts of the will had been destroyed, it would still be valid, although torn with intention to revoke, and therefore the preservation of it is too equivocal an act to be relied on

1858.

July 26.

ELMS v. ELMS.

1858. in forming my judgment upon this very nice question. But,
July 26. putting that out of consideration, upon the whole of this evidence, dealing with it, as if I were a jurymen, I say that I am
ELMS v. ELMS. satisfied, that the instrument brought into the registry was
duly executed by the deceased Lieutenant Jacob as his last
will and testament, and I am not satisfied, that it was revoked
by him. I must, therefore, pronounce for the will, and grant
probate of it.

C A S E S

IN THE

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

(Before the JUDGE ORDINARY.)

TOMKINS v. TOMKINS.

1858.

April 17.

*Alimony pendente lite. — Suit for Judicial Separation. —
Appearance given by Husband. — No Appearance by Husband. — Practice.*

TOMKINS
v.
TOMKINS.

Where the husband has appeared to the wife's citation in a suit for judicial separation, the Court will entertain an application for alimony *pendente lite*. *SECUS*, where no appearance has been given by the husband.

This was a suit for a judicial separation by reason of cruelty, promoted by Mrs. Tomkins against her husband, who had appeared in the suit. Mrs. Tomkins had given in a petition for alimony, and Mr. Tomkins's answers on oath had been taken. (See Rules 25 and 26, Form 12.)

Dr. Swabey, for Mrs. Tomkins, moved the Court to allot alimony *pendente lite*.

Dr. Spinks for the husband.

THE JUDGE ORDINARY: The difficulty I had with regard to a similar application made lately in the case of *Deane v. Deane*, was, that the husband had not appeared, and I am satisfied that by the 25th rule it was intended, that where the

1858. husband has not appeared, the Court should be precluded
 April 17. from entertaining an application for alimony *pendente lite*.

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 TOMKINS
 v.
 TOMKINS.

It was considered, that where the husband does not appear, there need be no delay in carrying through the wife's suit, and consequently that there would be no necessity for alimony, *pendente lite*. Here, however, the husband having appeared, I have no difficulty in granting the application. Taking his net income at £300, I allot alimony *pendente lite* at the rate of £60 per annum.

April 20.

(Before the JUDGE ORDINARY.)

—
 LEIGH
 v.
 LEIGH.

LEIGH v. LEIGH.

Suit for divorce à mensâ et thoro.—Decree for Costs in the Chancery Court of York.—Transference of Jurisdiction.—20 & 21 Vict. c. 85, s. 3.

Where a decree for costs, made in 1854 against the husband, was still outstanding in the Chancery Court of York, the JUDGE ORDINARY, on motion, directed the papers to be transferred to the registry, and the cause to be entered on the books of the Court, so as to enable it to enforce payment.

This was originally a suit instituted in the Chancery Court of York by Betsy Leigh, wife of John Leigh, against her husband for divorce by reason of adultery. Sentence was given in her favour in July, 1854, and the defendant was condemned in costs. In November, 1855, the proctor for the wife alleged his costs to be taxed at £451. 9s. 10d., and prayed a monition for payment; and in January, 1856, the defendant not appearing, the certificate was continued, and the costs not having been paid, the same certificate was continued up to the time of the transfer of the matrimonial jurisdiction to this Court.

Dr. Phillimore, Q.C., moved the Court "to allow the cause "to be entered on the books of the Court, in order that it "might be continued against the defendant." The wife did

not wish to throw her husband into prison, but still it was desirable not to lose the hold on him, which the decree for costs gave. He submitted that, under the 3rd section of the Divorce Act, the Court had full power to grant this motion.

1858.

April 20.

LEIGH
v.
LEIGH.

THE JUDGE ORDINARY: If the papers are transferred to this registry, the cause may be entered on the books of the Court.

(Before the JUDGE ORDINARY.)

TOURLE v. TOURLE AND ANOTHER.

April 22.

TOURLE
v.
TOURLE AND
ANOTHER.

Petition for Dissolution.—Answer.—Affidavit in Verification.—Rule 15.

Each plea should be an answer, *per se*, to the whole of the matter to which it is pleaded. All matter in an answer beyond a simple denial must be verified by affidavit, which however need not be in absolute terms. The affidavit of the petitioner may speak "to the best of his knowledge and belief," as well as to matters absolutely within his personal cognizance.

This was a question of practice arising in a suit for dissolution of marriage at the petition of the husband, by reason of the wife's adultery.

The petition charged the adultery on the 1st of September, 1856, and on other days between that day and the 19th of February, 1858.

The respondent answered:—1. Denying the adultery as charged. 2. That Mr. Tourle deserted her without any reasonable cause on the 4th of September, 1857. 3. Condonation. 4. Connivance.

The respondent's affidavit filed with this answer, according to rule 15, verified only the second plea.

The petitioner replied to this answer, objecting to the second plea as irrelevant, and bad in law; and to the third and fourth pleas as not verified by affidavit in conformity with rule 15.

The respondent denied this replication.

1858.
 April 22.
 ———
 TOUBLE
 v.
 TOUBLE AND
 ANOTHER.

Mr. Kingdon, in support of the replication: The objection to the third and fourth pleas is, that, though they introduce new matter beyond a simple denial, they are not verified by the respondent's affidavit, as required by rule 15. The second plea is bad in law, as it professes to be an answer to the whole of the charges laid in the petition, whereas it is an answer only to part. The adultery charged extends from September, 1856, to February, 1858; the plea is, desertion since September, 1857, which may be a very proper answer, to the adultery charged from that time till February, 1858, but leaves quite untouched that period of the charge which extends from September, 1856, to the date of desertion.

Dr. Phillimore, Q.C. (Dr. Spinks with him), contra: It is true the desertion, as laid, does not extend to the whole period during which adultery is charged, but that part of the plea as to condonation must be taken as referring to the dates given in the petition; and as the evidence may turn out, the condonation may or may not cover the whole case. As to the defect imputed to the respondent's affidavit, that it fails to verify the third and fourth pleas, it does not seem reasonable to expect a woman to swear to condonation or connivance on the part of her husband, as she would thereby, by implication, be charging herself with adultery.

THE JUDGE ORDINARY: According to the system wished to be introduced, each plea should be perfect in itself, and *per se* an answer to the matter to which it is pleaded. If requisite, each plea may be limited as to time and other particulars. In this case the proper form of the second plea would be, that, as to the adultery charged in the petition since a certain date, the petitioner had deserted his wife without reasonable cause. As to the affidavit in support of the third and fourth pleas, I cannot see that the respondent would be worse off by making the affidavit as to condonation, than by proving the plea. But the affidavit need not be in absolute terms. She may very well swear that the adultery, if any, was condoned. I am very far from desiring to press technical points, but it is a very wholesome rule that one plea shall not be construed by another. The second plea

must be amended and the third and fourth verified by affidavit.

1858.
April 22.

TOURLE
v.
TOURLE AND
ANOTHER.

Mr. Kingdon asked leave to file an affidavit supplemental to the one already filed by the petitioner verifying the petition. As originally filed, it only spoke to the marriage and cohabitation, which were thought to be the only matters strictly within the petitioner's cognizance; but it was now understood, that it was usual to verify the statements to the best of petitioner's knowledge and belief.

THE COURT assented to this.

(Before the JUDGE ORDINARY.)

FORSTER v. FORSTER AND EVANS.

April 28.

FORSTER
v.
FORSTER AND
EVANS.

Affidavit in Verification of Petition.—Sect. 41 of Divorce Act, and 2nd & 3rd Rules.—Practice.

The affidavit required to be filed in verification of a petition should not go into a detailed statement of the history of the parties. The Court may have no power to order an affidavit to be removed from the file of the Court, but on a question of taxation of costs, the costs of such an affidavit would not be allowed against the other party.

This was a suit for judicial separation, promoted by Mr. Forster against his wife by reason of adultery and cruelty. The petition charged the adultery to have been committed between the 6th and 15th days of September, 1851, and during the years 1855–56–57, and the months of January, February, and March, in the present year. The cruelty was charged from the month of September, 1856, to the 13th of February in the present year. The petitioner's affidavit, filed in verification of this petition, entered into a detailed statement of the acquaintance and intimacy between the parties, and of his own conduct, and of that of his wife's, extending over a period of several years.

1858.
April 28.
—
FORSTER
v.
FORSTER AND
EVANS.

Dr. Swabey, on behalf of Mrs. Forster, objected to such an affidavit being allowed to remain on the file of the Court. The 41st section of the Divorce Act, and the second and third of the rules, required every petition to be accompanied by an affidavit of the petitioner's verifying the facts stated in the petition, of which he or she has personal cognizance; but he submitted that the present affidavit, extending over twenty-six pages, and going into many details of matters of which no mention was made in the petition, was not such an affidavit as the above section and rules intended, and prayed the Court to direct large parts of it to be taken off the file of the Court.

THE JUDGE ORDINARY: I certainly think the affidavit goes into a detailed statement of the history of these parties, which was never intended by the rule you have referred to. But what harm does it do you? I don't know that I can order an affidavit to be taken off the file, but if it comes to a question of costs, such an affidavit would certainly not be allowed to be taxed as against your party.

May 4 and 6.

(Before the JUDGE ORDINARY and a Common Jury.)

TOMKINS
v.
TOMKINS.

TOMKINS v. TOMKINS.

Husband.—Wife.—Cruelty.—Judicial Separation.—Function of Jury.

When a question of cruelty comes before a jury as a ground for judicial separation, the jury are to determine, not only whether the acts complained of were done, but whether they constitute legal cruelty.

Bodily injury, reasonable apprehension thereof, or injury to health are the general tests of legal cruelty.

This was a petition for a judicial separation, preferred by Louisa Tomkins against her husband by reason of his cruelty.

Her petition charged acts of personal violence and blows,

constituting cruelty, from the year 1851 down to the 13th of January, 1858, when the petitioner left her husband, and shortly after instituted the present suit.

The answer of the husband admitted the marriage, cohabitation, and birth of children, but denied the truth of all the other averments in the petition, and prayed the Court to decree Louisa Tomkins to return to cohabitation, and treat the respondent with conjugal affection.

Mr. O'Malley, Q.C., and Dr. Swabey, for the petitioner.

Serjeant Shee, Dr. Spinks, and Mr. Russell, for the respondent.

Mr. O'Malley requested the Court to state what issue the jury would have to try. He apprehended that in a case of this nature it would be for them to find whether such and such blows had been struck or acts done, and for the Court to determine whether such blows or acts constituted legal cruelty.

[BY THE COURT : I rather apprehend, that in such a case as this I shall be bound to direct the jury what acts constitute legal cruelty, and they will have to find whether the acts done are cruelty or not. There may be, and are cases under the Divorce Act, where an issue may be directed to a particular matter of fact ; but here the fact or facts are the whole matter. It seems to me analogous to an issue directed to be tried by a Court of Equity ; such a Court, dealing with the rights of different parties under a will, sends an issue *devisavit vel non* ; the jury find not merely whether the testator signed his name on a sheet of paper, but whether the whole transaction is the legal expression of the intention of a competent testator,—whether it is the testator's will or not. So here I imagine, the issue is cruelty or no cruelty ; and I must inform the jury what cruelty is.]

The case of the petitioner was supported by her own evidence, by that of servants who had lived with the parties at various times, and by that of Mr. Barry, a farmer and

1858.
May 4 and 6.
TOMKINS
v.
TOMKINS.

1858.
May 4 and 6.

TOMKINS
v.
TOMKINS.

grower of potatoes, who had employed Mr. Tomkins for many years as his salesman in Farringdon Market, and had on several occasions remonstrated with Mr. Tomkins on his ill-treatment of his wife. Mr. Tomkins was examined for the defence, and admitted in fact blows and ill-treatment, provoked frequently, it was said, by Mrs. Tomkins's neglect of business and irritating manner and remarks, and insufficient, as was contended, to constitute legal cruelty.

THE JUDGE ORDINARY, in summing up to the jury, remarked: This is the first time that a jury have been called upon to decide questions of this kind, which the Legislature have now thought fit to submit to them. Hitherto the judges, who have had the sole determination of such questions, used to take the papers home and read them there, and if the first perusal unavoidably excited feelings of indignation on one side or the other, they had ample time for a calm re-consideration, and for forming their decision on a strict balance of the evidence. I am one of those who, after long experience, am convinced that questions of fact are best decided by a jury; but in questions of this particular nature, as a jury are obliged to decide at once, and have no such opportunity for re-consideration, it is incumbent on them to be on their guard, and not to allow themselves to be carried away by feelings of partiality, which may have been excited. I point this out in order to claim your calm and cautious deliberation in dealing, as you will have to do, when deliberating on your verdict, with a mixed question of fact and law. It will also be my duty to endeavour to point out what the law on such questions is, as now for the first time juries have to deal with these matters. Lord Stowell's judgment in *Evans v. Evans* (1 Consist. R.) is the great authority on questions of legal cruelty. That very eminent judge, whom I may in some sense consider as a predecessor of my own, remarks on the mischiefs which would ensue from giving the sanction of law to the separation of man and wife too easily, or on the mere disinclination of one or both of the parties to live together. "When people," he continues, "understand that they must live together, except for a very few reasons known to the law, they learn to soften by mutual accommo-

"dation that yoke which they know they cannot shake off; 1858.
 "they become good husbands and good wives from the neces- May 4 and 6.
 "sity of remaining husbands and wives; for necessity is a
 "powerful master in teaching the duties which it imposes." TOMKINS
 Lord Stowell refused to give any strict definition of cruelty. v.
 The causes which warrant separation "must be grave and TOMKINS.
 "weighty, and such as show an absolute impossibility that
 "the duties of the married life can be discharged. In a state
 "of personal danger no duties can be discharged, for the
 "duties of self-preservation must take place before the duties
 "of marriage. . . . What merely wounds the mental feelings
 "is in few cases to be admitted, where it is not accompa-
 "nied with bodily injury, either actual or menaced. Mere
 "austerity of temper, petulance of manners, rudeness of lan-
 "guage, a want of civil attention and accommodation, even
 "occasional sallies of passion, if they do not threaten bodily
 "harm, do not amount to legal cruelty; they are high moral
 "offences in the marriage state undoubtedly, not innocent
 "surely in any state of life, but still they are not that cruelty
 "against which the law can relieve. Under such misconduct
 "of either of the parties, for it may exist on one side as well
 "as on the other, the suffering party must bear in some
 "degree the consequences of an injudicious connection, must
 "subdue by decent resistance or by prudent conciliation; and
 "if this cannot be done, both must suffer in silence. . . .
 "In the older cases of this sort, which I have had an oppor-
 "tunity of looking into, I have observed that the danger of
 "life, limb, or health is usually inserted as the ground upon
 "which the Court has proceeded to a separation. The Court
 "has never been driven off this ground; it has always been
 "jealous of the inconvenience of departing from it, and I
 "have heard no one case cited in which the Court has
 "granted a divorce without proof given of a reasonable
 "apprehension of bodily hurt. I say an apprehension,
 "because assuredly the Court is not to wait till the hurt is
 "actually done; but the apprehension must be reasonable—
 "it must not be an apprehension arising merely from an
 "exquisite and diseased sensibility of mind." Danger of life,
 limb, or health has continued in substance the rule upon
 which the Courts have acted; the phrase has sometimes been

1858. varied. Sir John Nicholl has used the expression, "injury
 May 4 and 6. "to person or to health;" which I am inclined to take in
 conjunction with Lord Stowell's expression, for there might
 be a great deal of suffering and brutal usage without coming
 strictly within the terms of the latter. There must however
 be bodily hurt,—not trifling or temporary pain; or a reason-
 able apprehension of bodily hurt. It will be for you, on a
 consideration of the evidence you have heard, to determine
 whether the husband has so treated his wife and so manifested
 his feelings towards her as to have inflicted bodily injury, to
 have caused reasonable apprehension of bodily suffering, or to
 have injured health. It is for her to make out the affirmative
 of what she alleges.

TOMKINS
 v.
 TOMKINS.

The jury, after a short deliberation, returned a verdict for the plaintiff, and on the 6th of May the JUDGE ORDINARY pronounced a decree of judicial separation, with costs, against the husband.

Counsel for the wife then moved for leave to examine witnesses on her petition for alimony, under Rules 27, 29, before permanent alimony was decreed, as she considered her husband's income was understated in his sworn answers.

THE JUDGE ORDINARY, considering that under the practice of the Ecclesiastical Courts an application for increase of permanent alimony on proof of an increase in the husband's income would have been entertained, granted the motion; and permanent alimony was ultimately decreed, after hearing counsel on the affidavits produced by both parties.

In the case of *Deane v. Deane*, above referred to, the Judge Ordinary, after decreeing a judicial separation, made an order for permanent alimony. See p. 93.

(*Before the Full Court*,—LORD CAMPBELL, C.J., POLLOCK, C.B.,
and the JUDGE ORDINARY.)

EVANS v. EVANS AND ROBINSON.

1858.

May 10.

EVANS
v.
EVANS AND
ROBINSON.

Previous Suit in Ecclesiastical Court dismissed.—Jurisdiction of Divorce Court.

A. brought a suit against his wife by reason of adultery, in the Arches Court; at the hearing, the late learned Dean of the Arches pronounced that the husband had failed to prove the charge made, and dismissed the wife.

Held, that the previous sentence was no bar to a petition for dissolution of marriage brought by the same husband against the same wife on the same alleged facts of adultery.

This was a suit for dissolution of marriage, brought by Mr. Evans against his wife, by reason of her adultery. The question now raised was, whether Mr. Evans was estopped from bringing such a suit in this Court by reason of his having instituted a suit for divorce *à mensâ et thoro* against his wife on the same charges of adultery in the Court of Arches, which resulted, in the summer of 1857, in the late learned Dean of the Arches declaring that Mr. Evans had failed in proof of his libel, and dismissing Mrs. Evans from further observance of justice therein. From that sentence an appeal to the Judicial Committee of Privy Council had been instituted.

The Queen's Advocate (Sir J. D. Harding) and Dr. Deane, Q.C., for Mrs. Evans: The husband is estopped from proceeding in this Court; for, first, the same cause between the same parties was heard and adjudicated upon in the only Court of competent jurisdiction at the time existing; and secondly, an appeal from that sentence is now pending before the Judicial Committee.

LORD CAMPBELL, C.J.: We are clearly of opinion that there is no estoppel; the former suit in the Ecclesiastical Court was for a different object, namely, for a divorce *à mensâ et thoro*; here the petition is for dissolution of marriage, and before a tribunal armed with much larger powers than

1858. the Ecclesiastical Courts had, and following the same rules of
 May 10. evidence as obtain at common law. In the same way the
 appeal to the Judicial Committee cannot have the effect of
 depriving the husband of the different remedy which he is
 here seeking. *Lis alibi pendens* must be *lis ad idem*.

EVANS
 v.
 EVANS AND
 ROBINSON.

May 10 & 11. (Before the Full Court,—LORD CAMPBELL, C.J., POLLOCK, C.B.,
 and the JUDGE ORDINARY.)

NORRIS
 v.
 NORRIS AND
 GYLES.

NORRIS v. NORRIS AND GYLES.

*Dissolution of Marriage.—Co-respondent.—Costs under 34th
 Section.—Marriage Settlements.*

When the co-respondent has appeared to the citation, but has given in no answer to the petition, he cannot be heard even on the question of costs. The Court has no power to deal with a marriage-settlement, under sect. 45 of the Divorce Act.

This was a suit for dissolution of marriage, brought by the husband, a solicitor at Tenbury, by reason of his wife's adultery with Mr. Gyles, who had been curate of the parish of Tenbury since 1854. The marriage took place in 1847. In February, 1857, Mrs. Norris was advised to go to the Isle of Wight for change of air. Her husband accompanied her there, and left her in the house of Lady Holmes, a relative of her own. On the 24th of March she stated that she had received a letter from her husband, desiring her to come directly to him. She accordingly left the Isle of Wight, but never returned there or rejoined her husband. In the end of the year she was traced to lodgings in Lambeth, where she and Mr. Gyles were living together, and passing by the name of Mr. and Mrs. Grant. There was also evidence of their having passed three nights in December at an hotel near Paternoster Row, under the same name.

The co-respondent had appeared to the citation, but had not put in any answer to the petition.

Dr. Twiss, Q.C., and Mr. W. H. Cooke, for the petitioner.

In the course of the proceedings the marriage-settlement was put in and proved, with a view to any order the Court might make, under sect. 45 of the Divorce Act. 1858. May 10 & 11.

NORRIS

v.

NORRIS AND
GYLES.

Mr. H. T. Cole, for the co-respondent, cross-examined the witnesses produced to prove the petition, and was proceeding to address the Court.

BY THE COURT: For whom do you appear?

Mr. Cole: *Mr. Gyles* has been made co-respondent in this case and given an appearance, and I submit that I have now a right to be heard for him.

BY THE COURT: An appearance is nothing, unless you have answered. You were summoned to appear in the Court, and you were at liberty to put in an answer; but not having done so, and not having denied the allegations of the petition, you cannot now be heard on the case. It may be unimportant in this actual case whether you are heard or not, but the principle is of consequence. It seems to us that a person has no right to be heard, not having put in his answer; it would be most inconvenient, if it were so. It might have the effect of changing the whole aspect of the case at the hearing, without giving any notice to the petitioner.

Mr. Cole submitted that the Court would at least hear him on the question of costs, to which his client might be liable under the 34th section of the Divorce Act.

LORD CAMPBELL, C.J.: We have not yet arrived at that stage of the cause. In this case the petitioner is entitled to the remedy he prays, viz. a dissolution of his marriage. The marriage is proved and subsequent cohabitation; there is no ground for suspecting collusion, and the adultery is clearly proved. With regard to the marriage-settlement, it is proper that we should take time to consider and frame our judgment according to what is fit to be done.

Dr. Twiss applied for costs against the co-respondent under the 34th section.

1858. *Mr. Cole* requested to be heard on the question of costs.
May 10 & 11.

NORRIS
v.
NORRIS AND
GYLES.

LORD CAMPBELL, C.J. : At present we have a very strong opinion that you have no right to be heard even as to costs. We think it quite a case in which costs should be given against the co-respondent, and that you have no right now to be heard; if we see any reason to alter this opinion, you shall have notice of it.

May 11. LORD CAMPBELL, C.J. : We are confirmed in our opinion that the co-respondent, having put in no answer, cannot be heard on the question of costs. As regards marriage-settlements, we think we have no power to deal with them in any way.

May 12 and 13. (*Before the Full Court*,—LORD CAMPBELL, C. J., POLLOCK, C. B.,
and the JUDGE ORDINARY.)

TOURLE
v.
TOURLE AND
RENSHAW.

TOURLE v. TOURLE AND RENSCHAW.

Dissolution of Marriage.—Form of Record.—20 & 21 Vict.
c. 85, s. 38, rules 22 and 23.—*Issues for Jury.*—*Costs.*—*Co-Respondent.*

On a petition for dissolution of marriage, when a record is drawn up in order that the case may be tried before a jury, only the issues stated on the record are to be proved at the trial before jury by either party. The co-respondent, if he has put in no answer to the petition, is no party to the issue to be tried by the jury.

The co-respondent having put in no answer, is not entitled to be heard on the question of costs.

The co-respondent condemned in the costs of the suit.

This was a suit for dissolution of marriage, brought by the husband against the wife by reason of her adultery. The marriage took place in December, 1850. The record as settled for the jury (see sect. 38 of Divorce Act and 22nd rule) was as follows :—"In her Majesty's Court for Divorce and Matrimonial Causes, the 5th day of May, 1858.—John Joseph

“Tourle against Eleanor Ann Tourle and R. W. Renshaw.— 1858.
 “John Joseph Tourle did, in his petition presented in this May 12 and 13.
 “cause, allege that on the 1st day of September, 1856, and
 “on other days between that day and the 19th day of February,
 “1858, the said Eleanor Ann Tourle at divers places com-
 “mitted adultery with R. W. Renshaw; and Eleanor Ann
 “Tourle did in answer thereto deny that she committed adul-
 “tery with R. W. Renshaw as set forth in the said petition;
 “and as to the alleged acts of adultery, if any, on or since the
 “4th day of September, 1857, did affirm that the said John
 “Joseph Tourle deserted her without any reasonable cause on
 “the said day. And she did therein also affirm that the said
 “John Joseph Tourle had condoned the adultery of her the
 “said Eleanor Ann Tourle, and had connived at the same.
 “Whereupon the said John Joseph Tourle joined issue upon
 “the matters alleged in the answer of the said Eleanor Ann
 “Tourle. Therefore let a jury come.”

TOURLE
 v.
 TOURLE AND
 RENSHAW.

Mr. Slade, Q.C., Mr. Coleridge, and Mr. Kingdon, for the petitioner.

Dr. Phillimore, Q.C., Dr. Spinks, and Mr. C. Pollock, for the respondent.

Dr. Deane, Q.C., and Serjeant Ballantine, for the co-respondent.

Mr. Slade proposed to prove the marriage, but was interrupted by LORD CAMPBELL, C.J., who said that nothing was to be proved but the issues raised.

THE JUDGE ORDINARY: This record differs from the record of the whole proceedings in the Court of Divorce. The Act of Parliament provides that when parties have put on record all the statements they think necessary, then, if it be determined to refer any questions of fact to a jury, a further record is to be drawn up by one of the registrars of the Court, containing the questions for the jury to decide.

LORD CAMPBELL, C.J.: The proceeding before the Court and jury assumes the marriage.

1858. Ultimately a certified copy of the marriage register was put May 12 and 18. in to fix the date.

TOURLE
v.
TOURLE AND
RENSHAW.

Dr. Deane, for the co-respondent, who had put in an appearance but no answer, presumed that after the opinion pronounced by the Court in *Norris v. Norris and Gyles*, they would not hear him.

LORD CAMPBELL: Certainly not; the issues for the jury to try are adultery and the various pleas of the respondent.

THE JUDGE ORDINARY: Mr. Renshaw is no party to this issue.

The Jury found a verdict for the petitioner on all the issues, and the Court declared the marriage to be dissolved.

Mr. Slade, Q.C., prayed for costs against Mr. Renshaw, the co-respondent.

Dr. Deane, Q.C., for the co-respondent, wished to be heard against the application, but he had put in no plea.

BY THE COURT: We have considered this question, and we think that the co-respondent, not having pleaded, cannot be heard. We condemn Mr. Renshaw in costs of the petition.

PYNE v. PYNE. (*Before the Full Court*,—LORD CAMPBELL, C.J., POLLOCK, C.B., and the JUDGE ORDINARY.)

PYNE v. PYNE.

Dissolution of Marriage.—Adultery and Desertion.—Evidence.
—*Wife not a competent Witness to prove Desertion.*—14 & 15 Vict. c. 99, s. 4.

In a suit instituted by the wife for the dissolution of her marriage by reason of her husband's adultery coupled with wilful desertion, the wife is not a competent witness to prove the desertion.

This was a suit promoted by Mrs. Pyne against her hus-

band, for the dissolution of their marriage by reason of his adultery coupled with wilful desertion. 1858.

May 12 and 13.

No appearance had been entered on the part of the husband.
PYNE v. PYNE.

Dr. Phillimore, Q.C. (Mr. H. Lloyd with him), proposed to examine Mrs. Pyne to prove the desertion. It was not competent for her to give evidence as to the adultery, but he submitted that she was an admissible witness to prove the desertion.

THE JUDGE ORDINARY: If you look at the Act 14 & 15 Vict. c. 99, s. 4, you will see that it entirely excludes the wife from giving evidence in support of this petition. It expressly excludes parties "to any proceedings instituted in consequence of adultery" from being witnesses in such proceeding. This is a proceeding instituted in consequence of adultery. It could not have been instituted but for the husband's adultery.

(Before the JUDGE ORDINARY.)

ROBINSON v. ROBINSON AND LANE.

Mode of Trial in Court for Divorce.

May 29.

ROBINSON

v.

ROBINSON AND
LANE.

A. had obtained a sentence of divorce *à mensâ et thoro* from his wife, in the Consistory Court of London; he now brought a petition for dissolution of marriage.

On the consent of the respondent and co-respondent, the Judge directed the petition to be heard before the full Court on oral evidence without a jury.

In this case a petition had been filed for dissolution of marriage by Mr. Robinson against his wife by reason of her adultery. Answers had been filed both by the respondent and co-respondent.

Dr. Addams, Q.C., for the petitioner, said that Mr. Robinson had proceeded against his wife in the Consistory Court of London, and had obtained a sentence of divorce *à mensâ et*

1858.
May 25.
ROBINSON
v.
ROBINSON AND
LANE.

thoro. He had now to take the directions of the Court as to the mode in which the present petition should be heard. Having been of counsel for Mr. Robinson in the previous suit in the Consistory Court, he thought the cause was not of such a character as that the Court would be much assisted by a jury.

Dr. Phillimore, Q.C., for the respondent, and *Dr. Deane*, Q.C., for the co-respondent, stated that their respective clients did not demand a jury.

THE JUDGE ORDINARY: In that case it will be heard by oral evidence before the full Court.

June 2.

(Before the JUDGE ORDINARY.)

LING
v.
LING AND
CROKER.

LING v. LING AND CROKER.

Evidence.—Petition for Dissolution of Marriage.—Previous Divorce and Crim. Con. Action.—Proof by Affidavit.—Practice.

A. had obtained a divorce *à mensâ et thoro*, and recovered damages in a crim. con. action.

The Judge Ordinary, on the consent of the other parties, directed A.'s petition for dissolution to be heard on affidavit.

This was a suit for dissolution of marriage at the suit of the husband. He had obtained a sentence of divorce *à mensâ et thoro* in the Ecclesiastical Court, and a verdict for £1000 damages and costs in an action for crim. con., in which latter proceeding an application for a new trial on the part of the defendant had been refused by the Common Pleas. The co-respondent had appeared in this suit, and set forth in his answer to the petition the fact that the £1000 damages and costs had been paid by him.

Dr. Phillimore, Q.C., moved the Court to direct that this petition should be heard on affidavit. He understood that in the case of *Armitage and Armitage v. M'Donald* the Court

had, under similar circumstances, granted a similar application.

1858.

June 2.

Dr. Deane, Q.C., on behalf of the co-respondent, assented.

LING
v.
LING AND
CROKER.

Dr. Middleton, on behalf of Mrs. Ling, assented, and stated that she had no intention to put in any answer to the petition.

THE JUDGE ORDINARY: I very well remember the circumstances of this case, as I heard the argument in the Common Pleas for a new trial, and it would be very undesirable to parade all the facts again. *Motion granted.*

[In *Armitage v. Armitage and M'Donald*, May 6, on a similar application, the JUDGE ORDINARY observed: I think that may be so; but amongst other affidavits an examined copy of the record and judgment in the Common Pleas should be before the Court. I do not mean, however, by this to dispense with affidavits as to the facts. I was thinking of the Judge's notes; but we are to act on the rules of evidence that prevail in Westminster Hall, and I do not think we could take the Judge's notes as evidence.]

(Before the JUDGE ORDINARY.)

June 26.

POTTS v. POTTS AND ANOTHER.

POTTS
v.
POTTS AND
ANOTHER.

Mode of Trial.—Petition for Dissolution of Marriage.—Previous Divorce and Crim. Con. Action.—Nominal Damages.—Practice.

A. had obtained a divorce *à mensâ et thoro*, and had recovered in a crim. con. action a verdict for nominal damages.

The Court refused to allow the case to be heard on affidavit, and directed it to be heard on oral evidence.

Mr. S. Jacobs applied that the husband's petition in this case, which was for the dissolution of his marriage by reason of his wife's adultery, might be heard on affidavit. A divorce

1858. *à mensd et thoro* had been obtained in the Ecclesiastical Court of Durham, and a verdict for nominal damages had been given in a crim. con. action.

POTTS
v.

POTTS AND
ANOTHER.

THE JUDGE ORDINARY: Where nominal damages have been given, I think the petition should be heard on oral evidence.

June 2.

(Before the JUDGE ORDINARY.)

TOMKIN
v.

TOMKIN AND
ANOTHER.

TOMKIN v. TOMKIN AND ANOTHER.

Co-Respondent.—Suit for Dissolution.—Previous Divorce à mensd et thoro, and Damages recovered in Crim. Con. Action, 20 & 21 Vict. c. 85, s. 28.

A. had obtained a sentence of divorce *à mensd et thoro* in the Ecclesiastical Court by reason of his wife's adultery, and had recovered damages in an undefended action for crim. con. from B., the alleged adulterer, who was now at the Cape of Good Hope. A. was allowed to proceed with his petition for dissolution, without making B. a co-respondent.

This was a suit for dissolution of marriage by reason of the wife's adultery.

Dr. Addams, Q.C., moved the Court to dispense with service of citation and petition on the alleged adulterer. Mr. Tomkin had succeeded in obtaining a sentence of divorce *à mensd et thoro* in the Consistory Court of London in May, 1857. He had also recovered £1000 damages and costs in an undefended action for crim. con. The alleged adulterer was an officer in her Majesty's service, and was now at the Cape of Good Hope with his regiment. Under these circumstances he asked the Court either to dispense with the service of citation and petition, or to direct it to be served on his attorney.

THE JUDGE ORDINARY: The probable object, at least in part, of obliging a petitioner, as a general rule (sect. 28,

Divorce Act), to make the alleged adulterer a co-respondent, was that the latter might have an opportunity of appearing and vindicating himself. As in the present case the alleged adulterer has been sued already, and did not take the opportunity then afforded him of endeavouring to clear himself, I think there is no need now to make him a co-respondent.

1858.

June 2.

POTTS

v.

POTTS AND
ANOTHER.

(Before the JUDGE ORDINARY.)

HOOK v. HOOK.

June 26.

HOOK v. HOOK.

Co-Respondent dispensed with.—Wife living in a Brothel.

An application to proceed in a suit for dissolution, without making a co-respondent, granted, on the ground that the wife was living in a brothel.

QUÆRE, whether the wife can object to such an application?

Dr. Spinks, for the husband petitioning, applied for leave to proceed without making a co-respondent (sect. 28, Divorce Act), on the ground that the wife was living in a brothel.

Mr. Pollock, *contrà*.

THE JUDGE ORDINARY: I think very sufficient reason has been shown why the husband should make no co-respondent. Assuming that he had some ground of suspicion, or even knowledge, as against two or three persons, he might not have sufficient evidence to prove the case against them, and so might fail in his suit.

I am not sure that the wife has any right to come and object to such an application made on the part of the husband.

Application granted.

(Before the JUDGE ORDINARY and a Common Jury.)

PEACOCK v. PEACOCK.

June 7 and 8.

PEACOCK

v.

PEACOCK.

Petition for Judicial Separation.—Adultery.—Condonation.

Condonation is forgiveness of a conjugal offence with full knowledge

1858. of the facts, and in each particular case it is a question to be decided
June 7 and 8. by the jury.

PEACOCK
v.
PEACOCK. This was a petition for judicial separation brought by the wife against the husband by reason of his adultery. The issues before the jury were, first, the adultery charged by the petitioner; secondly, connivance at such adultery pleaded by the respondent; thirdly, condonation of such adultery pleaded by the respondent; and fourthly, a countercharge of adultery made by the respondent against the petitioner.

Dr. Swabey, Mr. H. Hawkins, and Mr. Phear, for the petitioner.

Dr. Phillimore, Q.C., and Mr. Cole, for the respondent.

The only question of importance, which the case presented, was that of condonation. The adultery had been committed, during Mrs. Peacock's absence from home, with a servant-girl, who left the service in the family-way and subsequently gave birth to a child. Shortly afterwards, in March, 1857, Mrs. Peacock's father heard a report that Mr. Peacock was the father of the child, and informed his daughter; upon which she left her husband's house, but returned to it after a few days on his reiterated assertions of his innocence, repeated after she had said to him, "If it is so, tell the truth, and I will forgive you." In September of that year she was convinced beyond all doubt of the fact of Mr. Peacock's guilt, and immediately left his house, and shortly afterwards instituted this suit.

THE JUDGE ORDINARY, in summing up, after explaining to the jury that condonation signified forgiveness of a conjugal offence with full knowledge of all its particulars, said: "I am of opinion that condonation is a question of fact to be decided by the jury, and I take this early opportunity of stating it, that my opinion as to the law on that point may be known, and the question decided on appeal if it is thought fit."

The jury, after a deliberation of some hours, found a ver-

dict on the first issue in the affirmative; and on the second, third, and fourth, in the negative.

1858.

June 8.

On the 8th of June the JUDGE ORDINARY decreed the judicial separation as prayed by the petitioner, and condemned the husband in costs, intimating that he entirely agreed with the verdict the jury had given as to there having been no condonation.

PEACOCK

v.

PEACOCK.

(*Before the Full Court*,—COCKBURN, C. J., WIGHTMAN, J., and the JUDGE ORDINARY.)

June 14 and 16.

WARD v. WARD.

WARD v. WARD.

Dissolution of Marriage.—Desertion.—Practice.

Where, on the evidence in support of an undefended petition for dissolution of marriage by reason of the husband's adultery, cruelty, and desertion, a doubt arose as to whether the parties had not voluntarily separated, the Court ordered the case to be adjourned under the 44th section of the Divorce Act to have further evidence produced.

To constitute desertion, the acts relied on must have been done against the will of the person setting up desertion; evidence of separation only tends to prove desertion.

This was a petition for dissolution of marriage, brought by the wife against the husband by reason of his adultery, desertion, and cruelty. The petition was unopposed.

Mr. Kennedy, and *Mr. O. B. C. Harrison*, for the petitioner, examined witnesses to prove the alleged charges. One of the witnesses said that she remembered *Mr. Ward* saying, that he and his wife had been before the police-magistrate, and had both been bound over to keep the peace.

COCKBURN, C. J.: This evidence raises a doubt as to the desertion. If disagreements and quarrels took place, and both parties were bound over to keep the peace, can you treat a subsequent separation as desertion? Suppose an arrangement had been made, by the advice of the police-magistrate,

1858. to separate by mutual consent. Though the husband may
June 14 and 16. have left her, yet if there were a corresponding *animus* on the
WARD *v.* WARD. part of the wife, if she were a party to his leaving and con-
sented to it, that would not constitute desertion. The act of
desertion must be done against the will of the wife.

THE JUDGE ORDINARY: You must not assume that evi-
dence of separation proves desertion, it only tends to it; the
fact of living with another woman does not necessarily prove
that a husband has deserted his wife.

COCKBURN, C. J.: Upon this evidence so much doubt is
thrown upon the case, that it must be cleared up, and the
best way is to know exactly what took place before the magis-
trate. We adjourn the case under the 44th section of the
Divorce Act; there can be no difficulty in showing what
really took place at the police-court.

On Wednesday, the 10th, the clerk to the magistrates at
the Southwark Police-court produced the bail-book and the
magistrate's book, in which the cases before him were shortly
entered. By these it appeared that Ward had been bound
over to keep the peace towards his wife, but there was no
entry as against her. The mistress of the house, where Ward
and his wife had last lived together, deposed to his violent
temper, drunken habits, and acts of repeated violence towards
his wife, owing to which she (the witness) had induced Mrs.
Ward to apply to the magistrate for protection. After that,
however, Ward left his wife; "He left her," said the witness,
"without a shilling; she was quite agreeable, because of his
"ill-usage; she was a quiet, hard-working woman."

COCKBURN, C. J.: Mrs. Ward is clearly entitled to a disso-
lution of marriage on the ground of adultery and cruelty, even
if there were any doubt about the desertion.

1858.

June 14.

(Before the Full Court,—COCKBURN, C.J., WIGHTMAN, J., and the
JUDGE ORDINARY.)

LING
v.
LING AND
CROKER.

LING v. LING AND CROKER.

*Divorce à mensâ et thoro.—Damages and Costs in Crim. Con.
Action.—Petition for Dissolution.—Proof by Affidavit.—
Co-Respondent.—Costs.*

Where the co-respondent had, in a previous action for crim. con., been condemned in damages and costs, and the husband had obtained a divorce *à mensâ et thoro*, the Court refused to make any order as to costs in an undefended petition for dissolution of marriage, which was heard on affidavit.

This was a suit for dissolution of marriage promoted by the husband against his wife by reason of her adultery. He had obtained a sentence of divorce *à mensâ et thoro* in the Ecclesiastical Court, and a verdict for £1000 damages and costs against the co-respondent in an action for crim. con. The co-respondent had appeared in this suit, and set forth in his answer to the petition the fact that £1000 damages and costs had been paid by him. The wife gave in no answer, and the case was, by the direction of the Judge Ordinary, heard on affidavit.

The Court decreed a dissolution of the marriage between the parties.

The only question that now arose was as to the costs of the present proceeding.

Dr. Phillimore, Q.C., for the petitioner, applied for costs against the co-respondent.

Dr. Deane, Q.C., *contrà* : By the old law three proceedings might be taken in a case of adultery, and in only one of those, namely, in the crim. con. action, could the paramour be compelled to pay costs. In the present case, the co-respondent has paid all the costs to which he would have been subject under the old law. There is nothing in the Act or rules to induce the Court to saddle him with two sets of costs.

1858.

June 14.

LING

v.

LING AND
CROKER.

WIGHTMAN, J.: If the whole matter had arisen under the present state of the law, the action for crim. con. would have been merged.

COCKBURN, C. J.: At all events the proceeding for damages would have been one and the same, and he would only have had to pay one set of costs. We purpose to lay down no rule applicable as a precedent in cases which may present some varying circumstances; but looking at all the circumstances of the present case,—that Croker has been condemned in damages and costs; that if it had not been for *ex post facto* legislation the husband would have gone under the old system for a bill in Parliament, and the co-respondent would have been liable for no further costs,—we think it will be fair to make no order as to costs.

Costs refused.

TEAGLE
v.
TEAGLE AND
NOTTINGHAM.

(*Before the Full Court*,—COCKBURN, C.J., WIGHTMAN, J., and the
JUDGE ORDINARY.)

TEAGLE v. TEAGLE AND NOTTINGHAM.

Petition for Dissolution.—Costs refused against Co-Respondent.

Costs refused against the co-respondent, there being no proof before the Court that he was aware that the respondent was a married woman, or of any of the circumstances under which the cohabitation with the husband was broken off.

In this case there was no doubt about the adultery, and costs were asked for against the co-respondent.

The evidence showed that the marriage took place in December, 1840, that Mrs. Teagle left her husband in November, 1851, and had for the last four or five years been living with the co-respondent as his wife, and had had two children born since she left her husband, who, as well as herself, passed by the name of the co-respondent—Nottingham. There was no evidence of the circumstances under which Nottingham had become connected with the wife.

THE JUDGE ORDINARY: It is consistent with the evidence that, when the connection commenced, Nottingham did not know that the respondent was a married woman.

1858.

June 14.

TEAGLE

v.

TEAGLE AND
NOTTINGHAM.

COCKBURN, C. J.: The case is left so bare of circumstances that it does not appear that Nottingham was aware that the respondent was a married woman. Moreover, when you want costs against the co-respondent, you must give the Court more insight into the circumstances of the disruption of the cohabitation under the marriage.

Costs refused.

(Before the Full Court,—COCKBURN, C.J., WIGHTMAN, J., and the
JUDGE ORDINARY.)

BADCOCK v. BADCOCK AND CHAMBERLAIN.

BADCOCK

v.

BADCOCK AND
CHAMBERLAIN.

*Petition for Dissolution.—Co-Respondent condemned in
Costs.*

Costs given against the co-respondent, who knew that the respondent was a married woman, though the husband's conduct towards his wife was remiss.

In this case the adultery was fully proved. The respondent's sister, who was examined as a witness to prove it, said of the petitioner, "He never made a home for my sister as he should have done, and they were mostly quarrelling, no doubt in part about the man Chamberlain."

COCKBURN, C. J.: The adultery is clearly made out. Chamberlain knew very well that the respondent was a married woman. I am inclined to agree with the view that the witness took, that there was some remissness on the part of the husband: still that is no excuse for Chamberlain. He ought to pay the costs.

Co-respondent condemned in costs.

1858.

June 16.

ROBOTHAM
v.
ROBOTHAM.

(Before the Full Court,—COCKBURN, C.J., WIGHTMAN, J., and the
JUDGE ORDINARY.)

ROBOTHAM v. ROBOTHAM.

*Dissolution of Marriage at Suit of Wife.—Order on Husband
to secure Sum of Money to Wife.—Custody of Children.—
20 & 21 Vict. c. 85, ss. 32, 35.*

Where the husband is out of its jurisdiction, the only power which the Court has, in case of dissolution of marriage, to make provision for the wife, is to make an order on the husband to secure a sum of money to her.

QUÆRE. Whether under the 35th sect., as regards custody of children, the Court should act on the rules hitherto acted upon in the Court of Chancery, or use a wider discretion?

Where the husband, by reason of whose misconduct the marriage was dissolved, was living in America, and the children remained in the custody of the mother in this country, the Court refused to make any order as to their custody; for any such order must have been final, and the circumstances and relative positions of the parties might be materially altered in the lapse of years.

This was a petition for dissolution of marriage, brought by the wife by reason of the husband's adultery and bigamy. The petition was not opposed.

Dr. Phillimore, Q.C., and *Mr. Macqueen*, for the petitioner, examined witnesses in support of the petition.—It appeared that the respondent was at the date of these proceedings living in New York, and a brother of the petitioner produced a letter, written to him by the respondent before he left England, in which he acknowledged the fault he had committed, spoke in terms of strong affection for his wife and children, and said that he would do anything to facilitate his wife becoming possessed of a sum of money that stood in their joint names in a savings bank. The learned counsel asked the Court to make an order under the 32nd section of the Divorce Act to put the wife in possession of this sum, about £34. They also prayed the Court, under the 35th section of the Act to make an order assigning the custody of the children to Mrs. Robotham.

THE JUDGE ORDINARY : This latter point involves a question of much importance,—whether this Court is to assume a jurisdiction larger than that which has been exercised by the Court of Chancery, or whether the Court is to apply the rules on which the Court of Chancery has hitherto acted? The words of the Act are very large: “The Court may, from time to time, before making its final decree, make such interim orders, “and may make such provision in the final decree as it may “deem just and proper with respect to the custody, maintenance “and education of the children, the marriage of whose parents “is the subject of such suit,” etc. But the Court of Chancery has always exercised very sparingly its jurisdiction in interfering with the common law rights of the father, even after the marriage has been dissolved by Act of Parliament.

As to the sum of money in the savings bank, all we can do, looking at the words of the 32nd section, is to make an order on the husband; you may then apply to the Judge Ordinary for an attachment, and if you can bring him here I may be able to deal with him.

COCKBURN, C.J. : There can be no doubt that the petitioner is entitled to the dissolution of marriage which she prays.

Beyond the sentence of dissolution, however, the Court is asked to do two things:—*First*, to make an order on the husband to secure to the wife a sum of money which stands in the names of both of them in a savings bank. From the husband’s letter, which has been read, he appears to be a consenting party to that, and we have no hesitation in making the order, so far as the Act gives us power. We make the order on the husband; but he is beyond the jurisdiction, and it may not be of much use to you. We are, in the *second place*, asked to order that the custody of the children shall remain with the mother. We certainly have on hesitation in thinking that, under the present state of circumstances, the children ought to remain with the mother; they have been abandoned and left unprotected by the father, and have been maintained by her. At the same time the father, from the letter we have heard read, appears to entertain considerable affection for them; it would be too much to say that the father, although repentant and contrite,

1858.

June 16.

ROBOTHAM
v.
ROBOTHAM.

1858. should be excluded from all intercourse with his children.
 June 16. Again, circumstances may change; the mother may remarry;
 and it may not be desirable that the stepfather should
 ROBOTHAM have the control of them; the father may return, in altered
 v. circumstances, and be able and willing to maintain and edu-
 ROBOT HAM. cate them.

By the terms of the Act of Parliament, our order must be final; we have no power to modify it; therefore, without saying that cases may not arise—they probably will—in which we should feel ourselves called on to exercise the power conferred by the Act, we are of opinion we ought to make no order in the present case. The father is in America; if he should seek to wrest the children from the hands of the mother, he could only do so by application to some Court; and we think that no Court would hand them over to a father guilty of bigamy and adultery.

May 18, 19, 20,
 21, 22, and
 June 21.

(Before the JUDGE ORDINARY.)

CURTIS v. CURTIS.

CURTIS
 v.
 CURTIS.

*Judicial Separation.—Cruelty.—Condonation.—Acts of
 Violence.—Threats.—Custody of Children.*

Condonation will not be pressed against a wife where a probable motive of continuing cohabitation after certain acts of violence was the fear of being deprived of her children, and of leaving them in the sole control of a harsh and excitable father.

All condonation is conditional; and, assuming certain acts of personal violence to have been condoned by continued cohabitation, the Court held that subsequent harsh and degrading treatment, short of personal violence, would cause a reasonable apprehension of further violence, and revive the former acts.

Whatever may be the cause or motive of the husband's misconduct, the wife is entitled to the protection of the Court if cohabitation is rendered unsafe, unless she is herself greatly to blame.

SEMBLE: If the evidence establish a plain case of condonation, the Court will take notice of it although not pleaded.

On decreeing judicial separation, the Court having no power under the 35th section of the Divorce Act to vary an order made as to the custody of children, and there being no fund out of which their maintenance

could be secured, made an order that the children should remain in the mother's custody for three months, so that the parties might avail themselves of the ampler power of the Court of Chancery.

1858.

May 18, 19, 20
21, 22, and
June 21.

This was a suit for separation by reason of cruelty, brought by Mrs. Curtis against her husband. The facts are sufficiently stated in the judgment.

—
CURTIS
v.
CURTIS.

Mr. Forsyth, Q.C., and *Mr. Mundell*, for the petitioner.

Mr. Curtis conducted his cause in person.

The principal witnesses examined were,—the petitioner, Mr. and Mrs. Flood (the petitioner's father and mother), the respondent's mother, and the respondent himself, who made his own statement on oath, besides addressing the Court on the evidence.

Cur. adv. vult.

THE JUDGE ORDINARY: This was a petition presented to the Court by Frances Henrietta Curtis, praying a judicial separation from her husband, John George Cockburn Curtis, on the ground of cruelty. The respondent denied the facts alleged in the petition.

June 21.

The marriage between the parties was solemnized in 1846, and they had issue four children, of whom three are still living, now of the respective ages of nine, eight, and five years. Before the case could be heard the petitioner applied for an interim order as to the custody of the children. I directed that the two elder children should remain at a school where they had been previously placed by the mother, and that the youngest should remain in her custody, the father having reasonable access to all of them, till the petition was disposed of.

The case, in statement and evidence, occupied the attention of the Court on the 18th and four following days of last month, and I have since bestowed upon it much anxious consideration, on account of the great importance of the subject generally, and the peculiar circumstances disclosed in this individual case. Some of the most learned judges who have ever presided in the Ecclesiastical Courts have declined attempting to give a strict legal definition of cruelty; but in several

1858.

June 21.

CURTIS
v.

CURTIS.

cases the rules by which a Court should be governed in deciding on such a question have been stated, and the leading cases on the subject are collected in the judgment of the Dean of the Arches in the case of *Westmeath v. Westmeath*, 2 Hagg. Ecc. Rep. Sup. 70. "In the case of *Evans v. Evans*, Lord Stowell said:—What is cruelty? In the present case it is "hardly necessary to define it, because the facts here complained of are such as to fall within the most restricted definition of cruelty; I shall therefore decline laying down "a direct definition. The causes must be grave and weighty, "and such as show an absolute impossibility that the duties "of the married life can be discharged; in a state of personal danger no duties can be discharged, for the duties of "self-preservation must take place before the duties of marriage. Further on he says:—Proof must be given of a "reasonable apprehension of bodily hurt. I say an apprehension, because assuredly the Court is not to wait till the "hurt is actually done; but the apprehension must be reasonable, not arising merely from diseased sensibility of mind." "So in *Harris v. Harris*, There must be something that renders cohabitation unsafe, or is likely to be attended with "injury to the person, or to the health of the party. Words "of violence may warrant the Court to interpose and prevent "the actual mischief; but when such violence of language is "accompanied with blows, it is a more aggravated case." "Again, in *Waring v. Waring*, The usual principles require "that such complaints should be supported by proofs of "violence and ill-treatment, endangering, or at least threatening the life, or person, or health of the complainant." The same doctrine is held in the case of *Holden v. Holden*: "The Court has to decide whether the conduct of the husband amounts to that *sævitia* which authorizes a separation. On this point the Court has had frequent occasion "to observe that everything is, in legal construction, *sævitia* "which tends to bodily harm, and in that manner renders "cohabitation unsafe. Whenever there is a tendency only to "bodily mischief, it is a peril from which the wife must be "protected. It is not necessary to inquire from what motive "such treatment proceeds; it may be from turbulent passion, "or sometimes from causes which are not inconsistent with

"affection. If bitter waters are flowing it is not necessary to inquire from what source they spring. If the passions of the husband are so much out of his own control, as that it is inconsistent with the personal safety of the wife to continue in his society, it is immaterial from what provocation such violence originated. Secondly, the law does not require that there should be many acts; for if one act should be of that description which would induce the Court to think that it is likely to occur again, and to occur with real suffering, there is no rule that should restrain it from considering that to be fully sufficient to authorize its interference. Thirdly, it is not necessary that the conduct of the wife should be entirely without blame, for the reason which would justify the imputation of blame to the wife would not justify the ferocity of the husband.

"These then are the principles by which these Courts have been governed; and according to which it is my duty to decide. There must be ill-treatment and personal injury, or the reasonable apprehension of personal injury. What must be the extent of the injury, or what will reasonably excite the apprehension, will depend upon the circumstances of each case; so likewise what may aggravate the character of ill-treatment must be deduced from various considerations,—in some degree from the station of the parties, in some degree from the condition of the person suffering at the time of the infliction. The complexion of individual acts may be heightened, nay, the acts may almost change their very essence, by the accompaniments: not only particular stations and situations, and the feelings almost necessarily arising out of them, but even acquired feelings may be entitled to some attention. In *Evans v. Evans*, Lord Stowell's remarks establish that what wounds, not the natural, but the acquired feelings will not absolutely be excluded by the Court when they are stated merely as a matter of aggravation; *à fortiori*, then, feelings which naturally belong to a wife or a mother of every station constitute a part of the consideration."

The first question to be determined, then, is, whether the respondent is proved to have been guilty of acts constituting cruelty, judging of the question by those rules. In order to do that it is necessary to examine with care the evidence

1858.

June 21.

CURTIS
v.
CURTIS.

1858.

June 21.

CURTIS

v.

CURTIS.

given in the cause, and to make allowance for the exaggerations which may be expected in the accounts given by parties whose feelings are much interested and excited, more especially when they are deposing to transactions which occurred several years ago. The necessity for caution, if not suspicion, on such occasions, was pointed out by Lord Stowell in *Oliver v. Oliver*, 1 Consist. Rep., and in *D' Aguilar v. D' Aguilar*, 1 Hagg. 782. It appeared in evidence that the marriage of these parties took place in 1846, not with the approbation, but with the reluctant consent of the lady's parents, who considered that his station in society was beneath hers; and I fear that to this feeling and the want of cordiality between the husband and the parents of the bride a good deal of what followed may be ascribed. On the eve of the marriage, when the parties met to execute a settlement which had been prepared, differences arose, and an unfriendly discussion lasted from ten at night till two in the morning. And here we have at once an instance of the imperfection of memory as to those transactions in which parties are engaged under excited feelings. Several alterations were during the discussion made in the settlement. Mr. Flood, the petitioner's father, stated in his evidence before this Court that they were made at the instance of his intended son-in-law, who had refused to execute the deed until they were made; in this he was directly contradicted by his own solicitor and the clerk of Mr. Curtis's solicitor, who attended on that occasion; and the nature of the alterations induces me to think that their statement is correct. Soon after the marriage, viz. in July, 1845, the parties went to reside in lodgings in the house of Mrs. Carberry, 16, Charing Cross, and remained there till the spring of 1849; and there two children were born,—Frances, on the 10th of April, 1847, and Mary, on the 31st of July, 1848. The petitioner, in her affidavit filed with her petition, deposed that during their residence at Charing Cross her husband treated her with cruelty, and assaulted, beat, and used personal violence towards her. Being cross-examined by him before this Court, she stated that the assault and beating mentioned in the petition was pushing her out of a room; and before she would swear to the affidavit, she inquired whether that was assaulting and beating, and she was told correctly that it

amounted in law to an assault and battery, but she should have been told at the same time that the Court would probably be misled by such a description of it. When examined before the Court other matters were stated as instances of cruelty, *e. g.* that he would not allow his first child to be baptized,—a refusal which he ascribed to his opinion that infant baptism was wrong, and, however erroneous his view of this subject, his conduct cannot be deemed an instance of cruelty; that when the child was dying he would not have medical advice, which was not true, but when it came to be sifted amounted to no more than this, that having consulted one physician of eminence, who said that nothing could be done for the child, he declined having another. To these another witness, Mary Gally, added two other charges of cruelty,—one, that when the child above mentioned died, she made some tea for Mrs. Curtis, which her husband would not give to her because he was then praying with her; the other, that after the birth of the first child Mrs. Curtis was suffering severely from a bad breast, and he would not allow her medical advice. The former is simply ridiculous as the foundation of a charge of cruelty; the latter must have been stated by mistake, for Mrs. Curtis never mentioned it at all, and until after her first child was born she was always, when she wished it, attended by Dr. Tweeddale, an intimate friend of her husband. But Mrs. Curtis deposed also to another transaction of a very different character, *viz.* that during an angry argument on some religious or political subject her husband spat in her face. This disgusting insult has been frequently treated, and very properly so, as an act of cruelty; but Mr. Curtis's denial was as positive as his wife's assertion; and as she never mentioned it at the time, nor indeed until the present proceedings were about to be commenced, I cannot but hope that something of a less aggravated character took place, which contemplated by her now at this distance of time, and with the imagination excited by other grievances, leads her to suppose that he really then insulted her as she has sworn. But whatever may be the true state of the facts, what was said by the Judge of the Consistory Court in *Westmeath v. Westmeath*, 2 Hagg. Suppl. 52, is applicable to this part of the case:—"A natural test of injuries of this kind, is the sense in which

1858.

June 21.

CURTIS

v.

CURTIS.

1858.
June 21.
CURTIS
v.
CURTIS.

"they are received: if they are not resented as injuries at the time, a state of things intervenes which either detracts from the weight of particular evidence when brought forward at a subsequent period, or may introduce quite another view of the relative situation of the parties."

It is needless then to pursue this part of the inquiry further; for if the act was committed as alleged, the continued cohabitation of the parties afterwards, as proved before me, would induce me to decline acting upon it now as a ground for decreeing a judicial separation.

But to pursue the history of this unhappy couple. In March, 1849, they removed from Charing Cross to Mr. Flood's house in Alpha-road, and remained there till November in the same year, living during all that time in perfect harmony. After that they took apartments in Blenheim-terrace, Regent's-park; there their dissensions were renewed and increased. Mr. Curtis objected to his wife's going to parties even at her father's house; he imagined that he was considered and treated by her family as an inferior, and she admitted that at her father's house, "engineering rubbish" was often talked of, (Mr. Curtis being by profession a civil engineer), although she said it was not done offensively; and on one occasion, when irritated by a dispute, she told him that the only compensation he could make to her for having induced her to marry him was to die. He became jealous and accused her of infidelity, for which there was no foundation whatever, and called her by opprobrious names, and she, in return, provoked by such treatment, in some discussion about the children said, that perchance they were not his, but had each a different father, whereupon he beat her, or as he said "boxed her ears." In November, 1850, Mr. Curtis had a severe attack of brain fever, became delirious, and was placed under constraint for some weeks; after that he talked of going to Australia, and wished his wife to accompany him; and on her refusal, according to her account, which was confirmed by other testimony, became very violent, and on more than one occasion beat her with his closed fist.

Upon this part of the case it is hardly necessary to observe, that if Mr. Curtis found that he did not succeed in his profession in England, and wished to remove with his family to Au-

stralia in hopes of improving his condition, he had a perfect right to do so, and no imputation on his conduct would arise out of such a resolution; but if he sought to put an end to his wife's objections, and to obtain her acquiescence in his views by violence, by threats and blows, he did that which is utterly inexcusable, and which showed him to be unfit to claim the society of his wife. Mr. Curtis's own account of these alleged acts is this:—"I may briefly state that I did not "beat and assault Mrs. Curtis in the manner stated by those "witnesses yesterday. I carefully went over the different "periods, and I certainly cannot recollect. The only occasion I can call to mind was that of boxing her ears when "Mr. Flood came in:" which certainly is too feeble a denial to induce me to discredit the positive testimony of the other witnesses. While these disputes about going to Australia were going on, Mr. Flood expressed an intention of making the children wards in Chancery, to prevent their being removed from this country, and on Friday the 3rd or on Saturday the 4th of July, Mary Gully, the witness, removed the two eldest children from Mr. Curtis's lodgings without his knowledge; they were afterwards taken back by Mr. Flood's order, and on the next day were removed by Mr. Curtis to his mother's, and he then resolved upon going to America and taking them with him.

It appears that he had some apprehension that it was Mr. Flood's intention to endeavour to get him placed in a lunatic asylum; his wife then said that if he was so shut up she would remain with him, and, at his desire, confirmed this with an oath. Mr. Curtis, in pursuance of his plan of going to America, went down to Liverpool next day, accompanied by his mother, his wife, and children, and on the following day he, with his wife and children, embarked for America.

Having carefully examined the evidence affecting this part of the case, I have come to the conclusion that the wife was most unwilling to leave England with her husband, and was only induced to do so by the apprehension of having her children taken from her and removed to a foreign land. Condonation was not pleaded by the respondent in answer to the petition, but if the evidence established a plain case of condonation, the Court would probably take notice of it, although

1858.

June 21.

CURTIS
v.
CURTIS.

1858.

June 21.

CURTIS

v.

CURTIS.

not pleaded ; for acts condoned and not revived by subsequent misconduct, could not be considered by the Court as a legitimate foundation for a decree of judicial separation.

But there are one or two points connected with the doctrine of condonation in general, and especially with reference to cases of alleged cruelty, which it may be proper to notice. I quite concur in the opinion expressed by Lord Stowell in *D'Aguilar v. D'Aguilar*, 1 Hagg. 781 : "All condonations by operation of law are expressly or impliedly conditional, for the effect is taken off by the repetition of misconduct,—condonation is not an absolute and unconditional forgiveness." It has also been well observed by Sir John Nicoll, in *Westmeath v. Westmeath*, that the cruelty which has been recognized as a sufficient ground for a divorce *à mensâ et thoro* must, with few exceptions, consist of a series of acts ; therefore condonation is not lightly to be presumed from a continuance of cohabitation after one, or even several, acts of cruelty. Again, such continuance may be obtained by the apprehension of some evil which is considered greater than the peril of personal injury,—*e.g.* the privation of children, and their removal to a foreign land under the unrestricted control of a harsh and excitable father. Had it been necessary to determine the point in this case (but subsequent events render it unnecessary), I should have had great difficulty in finding as a fact, or laying it down as a matter of law, that the wife, merely by accompanying her husband to America, had condoned all the preceding acts of cruelty which she now imputes to him.

No act of cruelty was imputed to Mr. Curtis during the voyage to New York, but the wife alleged, and the husband denied, that he struck her on the evening of their arrival. They changed their lodgings once or twice, and in the month of August were lodging in Hudson's Place, New York, when Mr. Flood arrived from England. Mrs. Curtis stated that on several occasions about that time he was very violent, and pushed her about the room, but she did not speak positively to blows, and did not complain of any to her father. Mr. Flood made some offer to Mr. Curtis to induce him to return to England ; but he refused to do so, and Mr. Flood returned in the month of November. It appeared that at that time

Mr. Curtis apprehended that it was Mr. Flood's intention to get him placed in a lunatic asylum if he returned to England, and, because he would not promise not to do so, Mr. Curtis refused to return. In the month of March, 1852, Mrs. Curtis wrote to her mother, giving an account of the manner in which she was then living, and that letter was produced at the desire of Mr. Curtis, and by him given in evidence, it must therefore be taken as evidence against as well as for him:—

“At Mr. Shave's, Eighth Avenue,

“Between the 53rd and 54th Streets, New York.

“My dearest Mother,

“I write to you this time, as I have things to say to you which I could not say to papa, and therefore you must look upon it that this letter is to you privately; besides, I am so dreadfully low-spirited today, and so confused, perplexed, and stupified, that I hardly know what I am doing, or what I had better do. I know your advice before I ask it; but I do not dare to do it. I am afraid of the reproaches of my own conscience afterwards; first of all, your guess as regards myself is only too true. I am afraid I shall be likely to have another baby this next summer. I cannot tell you with any exactness, for I paid so little attention to the matter at first, thinking such a thing out of the question; but I think the end of June or the beginning of July. You see, dearest mother, it is having this in prospect that makes me so dreadfully anxious about my other children: if it were not for this, I should be comparatively easy. I am sorry to tell you that things have not been going on so well lately; I do not know what to make of Curtis, he completely baffles my penetration, but I sometimes fear his mind is going again, not into madness, but imbecility; and this terrifies me as regards the children while I am out of the way. I will just, as I am writing to you alone, tell you what has happened since yesterday; but I am afraid of colouring it too highly, as indeed my feelings are greatly excited. Two little girls who live in this house, one four years old and the other six, came to play with my children yesterday afternoon, for the first time. My poor dears were delighted; it did my heart good to see them; they went upstairs altogether to the girl at supper-time, and I was on the point of following the minute after, when Curtis came

1858.

June 21.

—
CURTIS

v.

CURTIS.

1858.

June 21.

CURTIS

v.

CURTIS.

in, having been upstairs first, and having found the children together. He was evidently much put out and excited, and asked me what I meant by allowing strange children, of whom I knew nothing, to play with his children, and went on, in an angry and excited manner, to say that all the misery of his life had arisen from immoral habits learnt from other children, and that he insisted I should go upstairs and separate the children, and never allow them to be together out of my presence. I said they had not left my presence more than a minute, and agreed they should only play in my presence; but unfortunately, on his going on to be much excited, and to talk as I thought very disgustingly, I got angry, and said I refused to talk of such things, as I thought it corrupting. This only made matters worse, and at last I said, 'Really, if things go on in this manner I shall be obliged to put my children under the protection of the Government.' I said it, thinking it might do good to show a little spirit, and also from being really angry and disgusted; but the words were hardly out of my mouth when I saw the mistake I had made; and really, my own mother, the persecution and humiliation I have undergone since have been enough to break a heart of stone. Seeing that I had been wrong, and only made him worse, and being convinced that opposition did no good, I said I was sorry for what I had said, and begged his pardon, but all in vain. Ever since I have hardly known what to do. In the first place, he would not let me come to prayers with the children, or have anything to do with them last night, and went on perpetually at me the whole evening; next, he made me beg his pardon over again in the presence of my servant, explaining to her that I had been impertinent to him, and the poor girl not knowing which way to look from not liking to be made such a fool of: then this morning there has been the same thing over again,—scolding, scolding, scolding without end, and I can conscientiously say without provocation, pointedly helping the servant to bread at breakfast before me, and at last, on my making some slight remark, sending me out of the room to finish my breakfast in my bedroom.

"I should have told you before, that last night he said he was not satisfied with the sincerity of my repentance, and should therefore devise some punishment for me, and so ac-

cordingly he came into my room when I had finished my breakfast, and said he had for this day given the charge of the children to Ann, that is the girl, instead of to me; that I might go out, or do as I pleased, but that I was not to see the children, or meddle with them in any way; and on the children running into the room, he sent them off, telling them repeatedly that mamma was naughty. He then told me that by submitting to his punishment with a good grace, I could show my repentance, and praying God to bless me, he went out, and the girl tells me that as he went away he was crying, and several times while he was lecturing both last night and today he appeared on the point of bursting into tears, and often at other times also. So you see, dearest mother, here I am today. I can only see my children by stealth, and telling lies when he comes in, and pretending I have not seen them; and though this punishment is only to last one day, is it not a cruel and outrageous thing to do? I feel certain that it is chiefly done from a feeling of fanatic enthusiasm, and thinking that I belong to the world and not to God. I am so stupified, and my mind is so completely lost by perpetual thinking on the same subject, that I know not what to make of it. I had a great mind to go off to Dr. Nicoll, after he was gone out today; but what can I say to him so long as Curtis is well enough to do his work, and satisfy his employers?

“I ought perhaps to have told you that I think the real offence to Curtis was, that seeing him as I thought getting more odd for some time, and thinking it fair to warn him, I told him, I am afraid not in the most judicious manner, that it appeared to me that his mind was trembling on the verge of insanity, and this, I fear, is what rankles in his mind. I told it him simply because I thought it right to give him warning. But you see I went against the plan I had laid down for myself, and I did wrong. Now I certainly will never contradict him again. I would to God I could tell what to do, but he seems so wrapped up in the children that I do not like to take them away, in spite of anything I may suffer, and I do not see that they are at present threatened. Then there is this horrible confinement business, which though I do not in the least fear it for myself, I fear it for my poor dears. And my girl wants to go as soon as I can get another, the work is

1858.

June 21.

CURTIS

v.

CURTIS.

1858.
June 21.
CURTIS
v.
CURTIS.

too much for her. Besides which, she does not like the whole concern, which I can't wonder at. Fancy Curtis saying in his rage last night that by my opposition I laid on him the temptation of being obliged to pray that he might not wish for me to die in childbirth, that he might be able to bring up his children in the fear of God, etc. I don't see what can be done. If you were even here, my dearest mother, it would do no good; and when you were gone, he would again be worse. Betsy, I think, could do no good, as I could not have her here in the house secretly; and papa would only make him furious. I would to God he would do something that would set me at liberty. I often wish he would strike me, but that he never attempts,—indeed, he seemed much kinder for awhile; but the plain fact is, that he carries the idea of his authority to a mania. I should feel that I could leave at any moment were it not for this confinement, but that is the great difficulty. As far as my own health is concerned, I am perfectly well and quite strong. I am a wonder to myself; nothing seems to hurt me, and I will take care to have a proper doctor, nurse, and all things needful, so that for myself I have no fear; besides Curtis has a great notion of doing what he pleases to consider proper for me in the way of a nurse and so on. I feel my own irresolution and weakness are to be blamed as much as you can blame them, but it is very hard to know what to do. He is so particular that, finding a magazine I had bought to read ('Harper's Magazine,' considered the best here), he tore it all to bits, and burnt all but a few pages, telling me not to bring books into his house until he knew what they were about. I hardly like to bring a book into the house, for fear of his objecting to it. Pray continue, dearest mamma, to send the papers: they help to keep me sane.

"I suppose I must give Curtis yet another trial, and see what constant humouring will do; but it is so impossible and wicked to be always deceiving and telling lies, and the children get such chatterboxes, that the other night, after little Mary had a powder, she told her papa of it when he came in, and I was obliged to deny it, which grieved me much. I have been obliged to have Dr. McKenna, unknown to Curtis, to see Mary; she was covered with spots, which I think chicken-pox; he ordered powders and other things, which

have done her much good, and she is now quite well again. My servant-girl even asks me how I could come to America with Curtis. She is in a great hurry to go, and I must try and find another, and a better one if I can. I wish to induce Curtis to go to Hoboken or Brooklyn, which are the same as New York, only on the other side of the water, and much healthier for the summer, but I fear if I spoke of it he would only set himself against it. I saw Mrs. Ashton the other day; she sat with me some time; she tells me she was obliged to keep her children in New York one summer until after her confinement in July, and that though they suffered much from the heat, they were not seriously ill. I am encouraged at hearing this, but I fear that Curtis's notions, such as hating blinds, and liking the full blaze of the almost tropical sun, will do harm, for one's only chance is in keeping the rooms as dark as possible. He unfortunately found out that Mrs. Ashton had called, by finding some particular kind of cake which she always brings; he opened the drawer in which it was. He was very angry with me for not telling him she had been, and this morning desired Ann to tell him in future if anybody called. He cannot get over not knowing Mr. Ashton himself. You see it is necessary in everything to flatter his *amour propre* if he is to be kept in tolerable humour. He now says boldly that his object is to bring up his children away from the world, and you may be sure that is what keeps him here.

"I mean this letter for you especially, my dearest mother, because I think papa has undergone so much from Curtis that he would think too much of all I say; but indeed I am very, very miserable. If I ought to leave, I ought to leave of myself, and not from anything you say; and when I look at those precious children, and think of perhaps dying here and leaving them, you cannot wonder that my heart should seem near breaking. If I even felt sure I was doing right in staying and suffering, and complying with all Curtis's notions, I should be less miserable! but the uncertainty from day to day what is best for me to do, or who is in the right, distracts me. I will write another letter, which I suppose you will get at the same time with this. I have written myself into better spirits, dearest mamma, and have stolen in to look at my darling as

1858.

June 21.

CURTIS

v.

CURTIS.

1858.
June 21.
—
CURTIS
v.
CURTIS.

he lies asleep,—God have mercy upon us all ! I do not like to be a trouble to people, but I am much tempted to go to the hospital on Monday at twelve o'clock and try if I can see Dr. Nicoll ; but I do not know whether I ought to pay him, or how much ; and in fact, as I said before, while Curtis keeps on going to the office and getting his wages, I don't see that anything could be done ; still I should like to know certainly. The extreme seclusion of the life which we lead is, I am sure, very hurtful to the mind ; one does not know right from wrong, and I am sure I could not say at this moment whether Curtis is right or I am right. Still I cannot get over the fact that his mind is going. He seems to me to be nearly as bad as he was for a day or two before he took the wine. The extraordinary mixture of arrogance, self-love, love of power, with religious feeling and enthusiasm, is too much for me to understand, and especially when, added to all this, there is the occasional breakdown into tears and misery.

“ Good-bye, my own dearest mother ; forgive me for all the grief I cause you, and believe how much I love you. Pray God to direct your child, my own mother. Good-bye, ever your own most affectionate,
F. H. CURTIS.”

I presume that the object of the respondent in reading this letter was to draw the attention of the Court to two passages, as affecting the charge now made by the petitioner of cruelty towards herself and her children. The first of these is : “ I would to God I could tell what to do, but he seems so wrapped up in the children that I do not like to take them away, in spite of anything I may suffer, and I do not see that they are at present threatened.” The other is in these words : “ Would to God he would do something that would set me at liberty. I often wish he would strike me, but that he never attempts ; indeed he seemed much kinder for awhile, but the plain fact is, he carries the idea of his authority to a mania.”

The first of these passages is certainly inconsistent with the idea of his being habitually cruel to the children ; but the latter part of it, “ I do not see that they are at present threatened,” rather leads to an inference that at other times they had been in peril of ill-usage, and, taking the whole together, it is not by any means sufficient to induce me to reject as untrue the evi-

dence of Mrs. Curtis on this head, although it is possible that her excited feelings have caused her to give a somewhat highly coloured account of the acts complained of. The respondent before the Court admitted the habit of chastising the children, but denied any such severity as was imputed to him by his wife and her father. But the correction, as described by himself, which he administered to a girl not four years of age, and to a boy hardly two and a half, was not that which might have been expected from a father wrapped up in his children, unless he was subject to fits of passionate excitement strong enough to overcome, for a time at least, his parental affection. Again, with regard to the wish expressed, that he would strike her, but that he never attempted it,—taking it in connection with the evidence given, it rather leads me to the conclusion, not that he had never been guilty of such an act, but not recently, and that she considered that some fresh act of violence was necessary to found an appeal to the law.

The whole letter taken together gives a melancholy picture of the condition in which the petitioner was then living, and there is an air of truth, sincerity, and candour about it, which is well calculated to gain the confidence of this Court. It is true that the letter proves that she had not recently before that time suffered any personal violence; but assuming the whole letter to be true, she was treated with great harshness, insulted in the presence of her servant, displaced from her proper position in her house, and rendered subordinate to her own servant; not indeed on account of any immoral propensities of the respondent, but from a violent and unreasoning exercise of authority,—a course of treatment, in my mind, constituting a breach of the implied condition which the law would annex to any condonation of earlier acts of cruelty, and sufficient to excite a well-founded apprehension of further violence.

In consequence of this letter Mr. Flood went again to America, and after a short time applied to the British consul at New York, caused Mr. Curtis to be apprehended as a dangerous lunatic, and to be confined in a lunatic asylum. Mrs. Curtis gave birth to a daughter shortly after her husband's apprehension, and seven days after her confinement Mr. Flood took her and her children on board a steamboat, and brought

1858.

June 21.

CURTIS

v.

CURTIS.

1858. them to Ireland, where she continued to live at his house till
June 21. 1857.

—
CURTIS
v.
CURTIS.

Upon this transaction I make no comment, for Mr. Flood is not before the Court in any other character than that of witness; and it is, therefore, no part of my duty to observe upon his conduct, except as a witness, or as taking part in transactions that have an immediate bearing on the question to bedecided; but I must observe that he seems to have been actuated by a feeling of animosity towards Mr. Curtis, which induces me to receive with caution his statement of facts, where he is likely to have taken an impression respecting them under the influence of excited and hostile feelings. Before she left New York the petitioner wrote to her husband, and on the 15th of August, 1852, he wrote to his wife a letter, in which he admitted having acted towards her with great harshness and unkindness, and expressing hopes that if they lived together again he might do better for the future.

The learned Judge here read the letter:—

“Bloomington Lunatic Asylum,

“August 15, 1852.

“My own dear Fanny,

“I had been very anxiously expecting some tidings of you and the dear children, when the doctor kindly allowed me to read your note of inquiry to him, and though you say nothing as regards yourself and the dear children, it was so far satisfactory that, from your saying nothing to the contrary, I hope it shows that you all arrived in safety, and I trust therefore, dearest, that you are all well and are enjoying the comfort and happiness which you hoped to derive from your return to your mother and to England.

“The doctor has kindly given me permission to write to you without my letter being subjected to examination, as is the ordinary rule of this place, and I do trust, dearest, that, when you write in return, you will assure me that you neither have nor will allow this or any other letter I may write to be read by or shown to any one other than yourself. I hope, dearest, you will now discard from your mind all feelings of resentment as regards the past, and I entreat you fully and freely to forgive me for all the wrong I have done you. I have much time for reflection since I have been here, and I

now see how unloving, unkind, and uncharitable all my conduct has been; but pray, dearest, to believe that (notwithstanding all that has passed) my love and affection for you remain unchanged. On many points, also, the conceptions on which I acted I now see were erroneous, and could only have arisen from extreme anxiety, coupled with the disadvantageous circumstances and impressions under which we mutually laboured. I am anxious to have some idea as to what course to pursue in reference to the future. I should be glad, therefore, my own dearest Fanny, if you would let me know candidly the state of your views and feelings on that point, and whether you think that we could manage to get along together again. Write fully, dearest, your opinion on these points, and, above all, let us both earnestly pray to God for his assistance and guidance. I shall be so glad to hear how you and the dear children are. Pray kiss them over and over again, and as regards the last, give her her first blessing from her father. I want you, if you have not already named her or fixed upon some other name, to call her Frances. Try and make peace for me with your father, and write me word what the state of his mind is as regards me. Kiss your dear mother for me, and make peace with all. I shall most anxiously await your reply; and meanwhile pray much for me, and much for yourself, dearest, and let us both hope that God may turn these present troubles into blessings upon ourselves and our children. When you write, communicate with me freely as to your present pecuniary position, and also as to what steps you take as regards the different money and other matters, of which I pointed out to you the papers as those it would be necessary to take charge of in the event of my death. Good-bye, dearest; don't criticize or comment on this, my first letter, too severely, I pray. Accept a kiss from your own affectionate husband,

" J. G. C. CURTIS.

" P.S. You must ask your father to forget all that I said that was flippant, harsh, or unkind. Try, dearest, as I said before, your utmost to make peace between us. You, who have had time for reflection, will readily see how much of my conduct and views to both yourself and your father were occasioned by the lingering weakness incidental to my previous aberration of

1858.

June 21.

CURTIS

o.

CURTIS.

1858.

June 21.

CURTIS

v.

CURTIS.

mind, and by the deep impression which your father's threats unfortunately produced ; but let us hope and trust to set matters right as regards the future ; and above all, dearest, as I said before, let us pray to God that he will guide us in all our works and ways. Good-bye, dearest, again may God bless you and the dear children, and join us all to him."

Now this letter is important, for although it does not describe the particular acts of unkindness for which the writer reproached himself, it affords a strong confirmation to the evidence given by the petitioner on her oath before the Court. His mother went over to America, and soon afterwards procured his discharge from the asylum. He then went to Spain, and obtained some employment in the way of his profession there, nor did he attempt to have any communication with his wife until January, 1856, when he wrote to her from Spain the following letter :—

" 10, Piazza de las Barcas, Valencia, Spain,

" dated at Madrid, 19th March, 1856.

" My dear Mrs. Curtis,

" I duly received your letter of the 9th of last month. I had written previously to your brother Edward, and from him you will most probably have heard of my intention of coming up to Madrid. From my communications with the central authorities, I found that the revenue for the Valencia harbour works had become the subject of a law, which is now before the Cortes, and I fear the ultimate decision as regards the Valencia harbour project will, in consequence, be delayed for some time ; and as the works, if let by contract, will be put up to public auction, the obtainer of a concession for the supplying of the stone, etc., will thereby be rendered a matter of doubt. The parties connected with me are, however, very desirous that, if the contracts for the supplying of the stone be obtained, it should be placed under my direction. I am therefore looking out for something else to occupy myself with till the Valencia affair is decided, and, amongst other matters, am in treaty with an eminent capitalist, under whom I have been employed before, for the making of the studies for a proposed branch railway, about half-way from Madrid to Valencia. I write these details to show you that my future movements are somewhat uncertain. My health, thank God, is very good, and I think

it right again to assure you that I am very anxious to maintain an uninterrupted correspondence with you. If you write immediately, please address your letter thus :—

“ J. G. C. Curtis,

“ Yugeanai, Calle del Principe, No. 20,

“ Marta Pral,

“ Madrid.

“ If any time elapses, I think you had better address as before, in conformity with the printed heading. Pray give my kindest love to your dear parents and the rest of your family; and, notwithstanding all that has transpired, and of your having by your conduct released me from all ties or obligations as regards yourself, I do hope and trust that you will always believe me to remain,

“ Your sincere friend and well-wisher,

“ J. G. C. CURTIS.”

In 1856 he came to England, and did not attempt then to see his wife, but sent another letter to her through her brother, in these terms :—

“ 8, Bury Square, St. Mary Axe, Leadenhall Street,

“ London, June 25, 1856.

“ My dear Madam,

“ I write to inform you that I have this day arrived in London from Spain, and also to notice that I have as yet received no answer to the last two letters which I wrote to you, viz. of the 19th of March and the 4th of June instant. I can only, therefore, again repeat that, notwithstanding all that has transpired, I shall always be glad to hear from you; and with kindest love to your dear mother and family,

“ I remain, my dear Madam,

“ Your sincere friend and well-wisher,

“ J. G. C. CURTIS.”

In 1857 he went to her father's house in Ireland, in the county of Wexford, and presented himself to her, and pressed her to return to live with him. This she refused to do; high words ensued on both sides; he became much exasperated, and, as she stated, called down curses on her and her father, which he does not deny; whereupon she quitted the room, and soon afterwards quitted Ireland with her children, assumed a feigned name, and resided at Hornsey, Middlesex.

1858.

June 21.

CURTIS

v.

CURTIS.

1858. The respondent caused placards to be issued and posted in the
 June 21. neighbourhood of Mr. Flood's residence with respect to his
 wife's evasion, couched in very intemperate language:—

CURTIS
 v.
 CURTIS.

“£10 REWARD.

“Whereas Frances Henrietta, wife of John George Cock-
 burn Curtis, civil engineer, of 30, Great George Street,
 “Westminster, county Middlesex, England, and eldest daugh-
 “ter of Frederick Solly Flood, of Broomley Cottage, Kyle,
 “county Wexford, Ireland, Esq., and Justice of the Peace,
 “having left the protection of her husband, and absconded
 “from her father's residence on or about the 25th of July,
 “1857, without the knowledge or consent of her said husband,
 “taking with her his three children, Mary, John, and Frances.

“Notice is hereby given, that the reward of £10 will be
 “paid to any person who will give such information as will
 “lead to the recovery of the said children, or a reasonable sum
 “will be paid to any person giving information as to their
 “whereabouts.

“The descriptions of Mrs. Curtis and her three children are
 “as follows:—

“Mrs. Frances Henrietta Curtis, native of England, age 35,
 “height 5 feet 3 inches, figure inclining to stout, hair very
 “dark brown, eyes blue, not very prominent, complexion fair
 “and fresh, eyebrows not strongly marked, nose slightly
 “turned up, front teeth rather large, great expression of coun-
 “tenance, manner self-possessed and quiet.

“Mary Curtis, age 9 years, height 4 feet, hair dark brown,
 “eyes dark blue, complexion fair and rosy, nose straight,
 “movements lively.

“John Curtis, age between 7 and 8, height about 3 feet 9 or
 “10 inches, hair dark brown, eyes dark grey, with a slight cast
 “in one eye, complexion not so fresh as his sister Mary's,
 “usually accompanied by his mother, movements lively.

“Frances Curtis (usually called Fanny), age 5 years, height
 “3 feet 4 inches, hair dark brown, eyes blue, movements lively.

“Any information will be gladly received and promptly at-
 “tended to by the deeply-afflicted father of the children, ad-
 “dressed to his present residence at Kavanagh's Park, Kyle,
 “county Wexford, Ireland.

“Kavanagh Park, Kyle, 19th September, 1857.”

After some months he discovered her abode in England, went there and claimed to have possession of his children, whereupon this suit was instituted.

With regard to the conduct which Mrs. Curtis in her letter of the 17th of March, and in her evidence, imputed to her husband at New York, his answer did not amount to a contradiction, but only to a belief that it could not be true, and that any violence of which he had been guilty must be ascribed to his having never perfectly recovered from the effects of the brain fever by which he had been attacked in November, 1850. It is possible, perhaps not improbable, that there is truth in that suggestion: but if it be true, is there not reason to apprehend now a repetition of the same conduct? Has not the respondent since shown himself liable to violent excitement, both in the scene with his wife at her father's house in Ireland, and, afterwards, by the act of issuing and posting placards in the unwarrantable terms adverted to? Whatever may be the cause, I cannot but think that the respondent is now liable to become so much excited in any controversy with his wife, that their cohabitation would be attended with danger to her; and the observations made by the learned Judge of the Consistory Court in *Dysart v. Dysart*, 1 Robert. 116, are applicable to this case; he there says:—"When I find conduct towards a wife likely to prove dangerous to her safety, but not in other cases, I shall consider it within my cognisance, whatever may have been the cause thereof, whether having arisen from natural violence of disposition, from want of moral control, or from eccentricity. It is for me to consider the conduct itself, and its probable consequences; the motives and causes cannot hold the hand of the Court, unless the wife be to blame, which is a wholly different consideration."

If, indeed, an act of violence were committed under the influence of an acute disorder, such as brain fever, and it were made clear that, the disorder having been subdued, there was no danger of a recurrence of such acts, the case would be different. But, if the result of such a disease has been a new condition of the brain, rendering the party liable to fits of ungovernable passion which would be dangerous to a wife, then undoubtedly this Court is bound to emancipate her from such peril.

1858.

June 21.

CURTIS

v.

CURTIS.

1858.

June 21.

CURTIS

v.

CURTIS.

Believing then, as I do, that before the petitioner and her husband left England for America she had been treated with cruelty by him; that his conduct at New York was such that, bearing in mind his former acts, danger was reasonably to be apprehended from it, and that his more recent behaviour in Ireland proves that such danger still exists, I feel bound to grant the prayer of the petitioner and decree a separation between her and her husband.

Having thus disposed of the question of judicial separation, it remains for me to deal with the very delicate question of the custody of the children.

It appears to have been the intention of the Legislature to invest the Court, now entrusted with the duty of deciding nullity of marriage, dissolution of marriage, and judicial separation, with power to provide for the custody, maintenance, and education of the children of the parties whose marriage is to be affected by its decrees. But the Legislature has not prescribed any rules or principles by which the Court is to be governed in dealing with this peculiarly delicate subject. And I am in doubt whether it was intended that the Court should act as nearly as possible on the rules and principles by which the Lord Chancellor has been guided in questions relating to the custody of children, or whether it was intended to invest the Court with an absolute discretion, to be moulded by degrees into something like a system.

For the purposes of the present case it is unnecessary to solve that doubt. The evidence given before me by Mrs. Curtis and Mr. Flood, respecting the treatment which the children received from their father, was probably highly coloured and in no slight degree exaggerated; but after making due allowance for that, when Mr. Curtis's own admissions are taken into account, and when I consider also his long absence in Spain, without any attempt to see or inquire after them, and his assertion in the letter of January, 1856, that Mrs. Curtis had, by her conduct, exempted him from all charge and responsibility regarding them, and the great excitability since manifested by him in Ireland, I do not think it would be right that they should be delivered up to him.

But, as I cannot vary a decree once made, and there are no funds which I can direct to be applied to the maintenance and

education of the children, and circumstances may hereafter arise which may render it expedient and just to make some fresh order, I think that the most discreet course that I can pursue is to embody in the decree an order that the children shall remain in the custody of their mother for three months. And, in the meantime, application may be made to the Lord Chancellor, whose more ample powers will enable him to deal with them now and hereafter in a manner more consistent with their advantage and the rights of their parents.

1858.

June 21.

—
CURTIS
v.
CURTIS.

—
(Before the JUDGE ORDINARY.)

SPRATT v. SPRATT.

June 26.

—
SPRATT
v.
SPRATT.

Petition for Dissolution.—Interim Order.—Custody of Children.

In making an interim order under section 35 of the Divorce Act as to the custody of the children, the Court will adhere to, or depart from the common law rule according to its discretion.

Mr. Mills, for the husband (the petitioner), applied for an interim order for the custody of the children (sect. 35, Divorce Act). The parties were married in 1846, and separated in 1856. There were two children of the marriage, of the respective ages of seven and four years, one with the wife in London, and the other (the youngest) in the custody of her friends at Portsmouth, but under her control. The mother, according to the affidavit of the husband, was leading an abandoned life. He relied on the common law right of the father (*Rex v. Greenhill*, 4 A. & E. 624).

Mr. Frances, contra: The husband has had his remedy at common law for the last two years, but has not thought fit to use it. During the whole of this time he has allowed the children to remain under the mother's control. At least the youngest child is properly with the mother.

THE JUDGE ORDINARY: There is a great difference between an application to this Court and to the Court of Queen's Bench.

1858.

June 26.

SPRATT

v.

SPRATT.

The Queen's Bench would, by virtue of its jurisdiction, on writ of *habeas corpus*, have the children brought before it and deliver them to the father, unless very strong grounds were shown to the contrary. But a suitor has no right to appeal to this Court for any such purpose. The application here is not to enforce the common law rule, but to the discretion of the Court. I think it is reasonable that the eldest child should be given up to the father; but I will make any order desired for the mother to have access to it. The youngest child is of so tender an age, that there is no fear of its being contaminated by the alleged conduct of the mother, and it may remain with the mother's friends, on her undertaking not to remove it.

The eldest child must be given up within a reasonable time, say the day after tomorrow—Monday.

EVANS
v.
EVANS AND
ROBINSON.

(Before the JUDGE ORDINARY.)

EVANS v. EVANS AND ROBINSON.

Petition for Dissolution.—Application under the 40th Section of the Divorce Act to send Cause for Trial to the Assizes.—Jurisdiction.—Discretion of the Court.

Assuming that the Court has the power to send the main issue in a petition for dissolution to be tried before a Judge of Assize, who could pronounce no sentence in the suit, it is a power to be exercised very sparingly, and only under peculiar circumstances.

This was a petition for dissolution of marriage at the suit of the husband by reason of the wife's adultery; the case had been set down at the last sittings of the full Court for trial by a special jury, a sufficient number of special jurymen were not present, and neither party prayed a *tales*.

Mr. Huddleston, Q.C., for the petitioner, now prayed the Court to direct the issue in this suit to be tried at the next assizes at Gloucester before a special jury. Upwards of twenty witnesses resided in that county. The 40th section of the Divorce Act enabled the Court to do this.

Dr. Deane, Q.C., for the respondent, *contra*: Assuming that the Court had power to send the main issue in a petition for dissolution of marriage to be tried elsewhere, nothing would really be gained, as, at all events, no sentence could be pronounced but by the full Court.

1858.

June 26.

EVANS

v.

EVANS AND
ROBINSON.

Mr. Hodgson, for the co-respondent, *contra*, contended that the Court had no power to comply with the prayer of the petitioner.

THE JUDGE ORDINARY: I do not at present deal with the question of jurisdiction; but, assuming that the Court possesses it, I think it is a power very sparingly to be exercised. I cannot transfer the whole power of the Court to the Judge of Assize, and the matter must necessarily stand over for the decision of the full Court. There may, however, be extreme circumstances which would induce the Court to send a case to be tried in the country; but there are no such circumstances in this case. It is within my recollection that the case has been already tried at Liverpool and in London, and, on the latter occasion, very many of the witnesses were from London or its immediate neighbourhood. As to discretion, it would hardly be a wise exercise of discretion to send a case like this to be tried at an assize town a few miles distant from the place where all the circumstances of the case must have been matter of comment and gossip for the last two years. Without saying anything as to prejudice or the difficulty of getting an impartial hearing, Gloucester is certainly not a place which the discretion of the Court would choose. I reject the application.

(Before the JUDGE ORDINARY.)

RATCLIFF v. RATCLIFF AND ANDERSON.

Petition for Dissolution.—Application for Mode of Trial.—
31st Section of the Divorce Act.

RATCLIFF

v.

RATCLIFF

AND

ANDERSON.

Though neither of the parties desires a jury, the Court may still direct the issues to be tried before one.

1858.
June 26.
—
RATCLIFF
v.
RATCLIFF
AND
ANDERSON.

Where facts are in dispute before the full Court, it is the most convenient mode of trial; but where the principal issues were addressed to the discretion of the Court under sect. 31 of the Divorce Act, it directed the petition to be heard without a jury.

This was a petition for dissolution at the suit of the husband. The respondent and co-respondent had both given in answers to the petition.

Dr. Spinks now moved the Court to direct the cause to be heard by oral evidence, but without a jury. The pleadings raised several issues, but those which would probably be chiefly relied upon by the respondent and co-respondent were those upon which the discretion of the Court would be exercised under the latter part of the 31st section of the Divorce Act, which runs, "Provided always that the Court shall not be bound to pronounce such decree . . . if the petitioner shall, in the opinion of the Court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage . . . or of such wilful neglect or misconduct as has conduced to the adultery."

Dr. Swabey, for the respondent, and *Dr. Phillimore, Q.C.*, for the co-respondent, concurred in not asking for a jury.

THE JUDGE ORDINARY: Although none of the parties desire it, it does not therefore follow that the Court will not direct the cause to be tried before a jury. Where there is any controversy as to facts in a case to be tried before the full Court, I think it is generally most convenient and desirable to have a jury. But as by the section referred to the question here to be decided seems specially addressed to the discretion of the Court, and none of the parties ask for a jury, this case may be tried without a jury.

(Before the JUDGE ORDINARY.)

PECKOVER v. PECKOVER AND JOLLY.

Petition for Dissolution.—Personal Service.

Where the husband had had no tidings of his wife, who left him in 1850, except as living with the adulterer in 1851, and could gain no information of her by inquiring of her relations or at the places she was last supposed to have been at, the Court directed the citation to be left in the Registry, and advertisements of that fact to be inserted in newspapers.

Mr. Field, for the husband petitioning, applied, under sect. 42 of the Divorce Act, to dispense with personal service. The marriage took place in 1847; the parties cohabited till 1850, when on return from a journey the petitioner found that his wife had left him with two children. In 1851 he found some traces of her living with the adulterer; since then he had heard nothing of her. He had now made inquiry of every known relation of his wife, who all disclaimed any knowledge of her. He had also inquired in every place where he supposed she was in 1851,—at Islington, Liverpool, etc.—but without hearing anything of her.

THE JUDGE ORDINARY: I think under these circumstances it is impossible to require personal service. As the facts appear on the affidavit it would be tantamount to a denial of the remedy which the law gives him. The citation may be left in the Registry, and notice of that fact advertised in the 'Times' and 'Morning Post' at an interval of a fortnight.

(Before the JUDGE ORDINARY.)

WEBER v. WEBER AND PYNE.

Petition for Dissolution at Suit of Husband.—Alimony pendente lite.—Wife's Costs.

Where a husband had, under a deed of separation, allowed his wife a certain sum, and had ceased to pay it after the date on which he

1858.

June 26.

PECKOVER
v.
PECKOVER
AND JOLLY.

July 13.

WEBER
v.
WEBER AND
PYNE.

1858.
July 13.

WEBER
v.
WEBER AND
PYNE.

alleged that he had obtained evidence of her adultery, the Judge Ordinary, on the wife's petition for alimony *pendente lite*, directed payment by way of alimony *pendente lite* to be made at the same rate. The practice of the House of Lords on divorce bills warrants the Court in directing the wife's costs to be taxed from time to time against the husband in his suit for dissolution of marriage.

This was an application on a petition for dissolution of marriage, brought by the husband against the wife, by reason of her alleged adultery, for alimony *pendente lite*, and for the taxation of the wife's costs up to the present date.

From the husband's answers to the petition for alimony, it appeared that the parties had been living apart, under a deed of separation; under which he stated that he had paid an allowance of £52 per annum "up to the 1st of April last, when "proof of the facts of the adultery of the said Mary Emily "Anne Weber was obtained by this respondent."

The amount of the husband's income did not very clearly appear.

Dr. Swabey, for the wife, applied for alimony *pendente lite*, and prayed that the wife's costs in the suit should be taxed up to the present time.

Mr. Macqueen, for the husband.

THE JUDGE ORDINARY: I think alimony *pendente lite* may fairly be taken, under the circumstances of this case, at the rate of the allowance agreed upon in the deed of separation. As to taxation of costs, I feel some difficulty in making any such order in a petition for dissolution. I have followed the practice of the Ecclesiastical Courts on the point in that class of suits over which those Courts formerly exercised jurisdiction; but as regards dissolution of marriage, I exercise a jurisdiction which is the creature of the Act. I don't know what authority I have to make such an order.

Dr. Swabey.—The general presumption that the husband is in possession of the income, which was the ground of the practice of Ecclesiastical Courts, applies equally to petitions for dissolution of marriage. Means of carrying on suits of this nature were as necessary for the wife, and the husband was properly liable to provide such for her, unless he could show

that she had an independent income. The practice of the House of Lords on Divorce Bills warranted the prayer now made.

1858.

July 13.

WEBER

P

WEBER AND
ANOTHER.

By THE COURT: What is your authority for the practice of the House of Lords?

Dr. Swabey relied on the authority of his learned friend Mr. Macqueen, who was intimately versed in that practice.¹

Mr. Macqueen.—Certainly; the House of Lords have on several occasions ordered the husband petitioning for the bill to pay a sum of money to enable the wife to obtain the aid of professional advice in opposing it. In *Mrs. Campbell's* case, last Session, £50 was ordered to be paid by the husband for this purpose.

THE JUDGE ORDINARY: That, I think, though not precisely in the same form, affords me a sufficient principle on which to act, and I shall make the order for taxation of the wife's costs up to the present time.

(Before the JUDGE ORDINARY.)

BOSTOCK v. BOSTOCK.

May 24, 25,
and July 19.

BOSTOCK

P

BOSTOCK.

Judicial Separation.—Cruelty.—Condonation.—Revival.

Acts of violence and cruelty which have been condoned may be revived, without actual violence, by threats of such a nature and so expressed as to satisfy the Court that further cohabitation would be attended with danger to the party threatened. Where, after thirty years of married life, during which the parties had continually quarrelled, and the husband had been guilty of unjustifiable violence, and up to May, 1855, there was undoubted condonation, the wife left her husband's house in June, 1856, and brought a suit for divorce *à mensâ et thoro*, relying on threats alleged to have been uttered by the husband between February and June, 1856, the Court, not being satisfied that

¹ Macqueen's 'Practice of the House of Lords,' 531-2.

1858.
May 24, 25,
and July 19.

the threats were such as to have caused a reasonable apprehension of bodily injury, or that, in fact, the wife quitted her husband's house on that account, dismissed the suit.

Bostock
v.
Bostock.

This was a suit for a divorce *à mensâ et thoro*, commenced in the Consistory Court of London, and transferred to the Court for Divorce and Matrimonial Causes. The facts and circumstances are sufficiently stated in the judgment.

The case was argued in May last, by *Dr. Deane*, Q.C., and *Dr. Robertson*, for Mrs. Bostock.

The Queen's Advocate (*Sir J. D. Harding*) and *Dr. Twiss*, Q.C., for Mr. Bostock. *Cur. adv. vult.*

July 19.

THE JUDGE ORDINARY : This was a suit instituted by the wife in the Consistory Court of London for a divorce *à mensâ et thoro* on the ground of the cruelty of the husband, and transferred to this Court by stat. 20 & 21 Vict. c. 85.

The libel, which was brought in on the 2nd of April, 1857, alleged that the parties were married in 1827, and that they have had thirteen children, eight of whom are still living; that soon after the marriage the husband began to treat her with cruelty, and then in several articles specific acts were mentioned; the sixth article alleged that in 1839 he presented a pistol at her; the seventh article, that in 1840 he was in the habit of saying, in the hearing of his wife and children, that she would not die a natural death, and that she and his children would be found with their throats cut; the eighth article, that in August, 1841, he struck her in the face, and caused her earring to cut her face; the ninth, that in November, 1842, in consequence of his violent and abusive language, she went to bed in a room adjoining her husband's, and locked the door, that he broke it open with a hammer and endeavoured to drag her out of bed, and that she in consequence, about five o'clock in the morning, left her home and went to reside with her mother, but on his promising not to ill-treat her again returned to him in July, 1843; the tenth, that in July, 1845, he beat her violently, and that her face was in consequence swollen and bruised for several days; the eleventh, that in November, 1848, he attempted to strike her

with a constable's staff; the twelfth, that in September, 1853, he burst open the door of his daughter's bedroom, in which his wife was, and used toward his wife violent and threatening language; that he told her next morning to go to her solicitor for the purpose of making arrangements for a separation; that as no arrangement was made, she, being alarmed for her safety, on the 31st of October, 1853, left her home and took lodgings at Greenwich, in the house of her son, but, not having the means of supporting herself, she returned to her husband on the 10th of December, 1853. The thirteenth and three following articles alleged threats uttered at various times between the middle of February and the 13th of June, 1856, that he would serve her as Corrigan had served his wife; the seventeenth, that on the 13th of June, 1856, she, dreading further personal violence from him, finally quitted his house and went to reside with her mother. To this libel the personal answer of the husband was taken; then he brought in a responsive allegation, to which the wife gave her personal answer. Then witnesses were examined on both sides at considerable length. That evidence was examined and commented on by the learned advocates on each side.

It is unnecessary for me to enter into any examination of the greater portion of it. There can be no doubt that during the thirty years that have elapsed since these parties were married they have often quarrelled, and the husband on several occasions was guilty of inexcusable violence, excited by more or less of provocation on the part of his wife; but whatever might have been the result of any proceeding founded at the time on those acts of violence, it is indisputable that down to the summer of 1855 all quarrels had been followed by reconciliation and condonation; and in the month of May in that year Mrs. Bostock, having gone to Hastings, wrote to her husband to announce her arrival there, and gave a description of her lodgings. In the letter there is this passage: "My room has a four-post bedstead and a nice feather-bed, and I fancy I shall sleep so soundly tonight; I only want you with me; I cannot bear sleeping alone." The decision of the Court must therefore depend upon what happened after that time. It was hardly alleged, and certainly not proved, that the husband was guilty of any personal vio-

1858.

July 19.

Bostock

v.

Bostock.

1858.

July 19.

BOSTOCK
v.
BOSTOCK.

lence after the date of that letter; but in 1856, a person named Corrigan having been convicted and executed for murdering his wife by cutting her throat, it is said that the husband Bostock threatened to treat his wife in the same manner, and that in consequence of those threats she quitted the house with a resolution never to return. On behalf of the wife it was contended that where there has been personal violence followed by condonation, subsequent threats are sufficient to revive former transactions. On the other hand, it was alleged that threats are insufficient for that purpose, unless accompanied by some act amounting to an assault at common law.

After an examination of the authorities on this point, to be found in the reports of cases in the Ecclesiastical Courts, I do not hesitate to declare my opinion, that where there have been acts of violence followed by condonation, threats subsequently uttered, if of such a nature and so expressed as to satisfy the Court that further cohabitation would be attended with danger to the party threatened, do constitute a sufficient ground for a decree of judicial separation.

Now Mrs. Bostock, in her evidence given on the thirteenth article of her libel, on examination in chief as to these threats, says, "On several occasions my husband, in his excited state, declared to me that he would serve me in the same way as Corrigan had served his wife; and he used to say that if he were to do it, he was sure any jury would acquit him. He repeated this so often, and at the same time he looked at me in such a dreadful way, that I got quite terrified and apprehensive whether he might not carry this threat into execution." On the fourteenth article she says, "I was awoken by feeling his hand on my throat; he did not threaten to serve me as Corrigan had done his wife, but he asked me how I should like to be served as Corrigan had served his wife. I was a good deal frightened; it was not done in joke, oh no." On the sixteenth article she says, "Three or four times in the course of the 12th of June, 1856, the day before I left his house for the last time, my husband, in the presence of my children, threatened to serve me as Corrigan had served his wife." On the seventeenth, after describing her fears at night, she says, "I determined then that nothing should induce me

"to pass another night within his power, and when I left the next day, as I did, I did so with the determination never to return; I quitted and went to my mother's, who took me next day to the seaside." Now this is not altogether a candid statement. On the thirty-ninth interrogatory she says, "I will swear that I left the house, having the determination, as I then had that I would not return; that after the night of dread I had passed I would never pass another night within his power, only because I feared that he would murder me. I had been going to Margate on that day in any case, but going as I did with the determination never to return, was in consequence of my fear of his murdering me. I will swear that I left with the intention of saving my life, which I considered in danger, and with the intention that if I ever returned again it should be under protection, and to live wholly separate from my husband, so as never to pass another night in his power. I did before I left take luncheon with the ministrant and the three children; at least, I sat at the table. If I am obliged to say what my ideas were, I answer that I did think of returning shortly, but only with the determination of living separate from my husband and out of his power to injure me."

Catherine Elizabeth Bostock, one of the daughters, says, "Several times after there was that trial of Corrigan for murdering his wife, I heard my father threaten my mother that he would serve her as Corrigan had done his wife, and his looks at the time he said it proved that it would be no idle threat. The looks of hatred that he cast at my mother at these times were so horrid that they quite made my blood run cold. I heard him threaten my mother in this way many times in the course of the Spring of last year." Charlotte, another daughter, speaks much in the same manner. One of the sons, on the thirteenth article, speaking of the threats to serve Mrs. Bostock as Corrigan had his wife, says, "I recollect on one Sunday in particular, whilst we were at dinner, my father said to her before us that, if he were to do the same to his wife as Corrigan had done to his, no jury would hang him." Samuel, another son, says, "I often heard my father use the threat to my mother that he would serve her as Corrigan had served his wife; I have

1858.

July 19.

BOSTOCK

v.

BOSTOCK.

1858. "heard him at such times say to her that he would serve her
 July 19. "as Corrigan had served his wife, and add, that if he did, the
 BOSTOCK "jury would not bring it in as murder. He did not say why
 v. "they would not; that was what we wanted to know, why
 BOSTOCK. "they would not bring it in as murder against him. My
 "father uttered these threats against my mother in a very
 "cool way—a sort of determined way."

Now the respondent, on the twenty-third article of the responsive allegations, gives his version of these threats:—"It is not true, as alleged in the libel, that on several or any occasions happening in the second week in Lent or in the month of February, 1856, I threatened to serve my wife as Corrigan had done his wife (meaning thereby that I would murder her by cutting her throat), or that I ever threatened her at all. When I have been much provoked by her conduct to me, I have on occasions expressed myself to the effect that, if I were to serve her as Corrigan did his wife, considering the amount of provocation she had given me by her disrespectful treatment, and constant neglect and desertion of me and her children,—though a jury of my country would find me guilty of the offence, I was certain I should be recommended to the merciful consideration of the Crown. It was only with the 'if' or 'were I,' and under such circumstances as those just described, that ever I alluded to anything of the kind; not that I ever entertained the least notion of doing anything of the sort. It was merely an ebullition of anger at her conduct, for there is a limit to human endurance. I never lifted my hand against my wife but once, and that was on the occasion I have before referred to. I always regretted very much that I should have been provoked so far by her as to do it then, and often and often have expressed that regret to my wife."

Comparing Mrs. Bostock's statement on the thirty-ninth interrogatory, "He has on occasions before the children expressed himself to the effect interrogated, viz. 'If I were to serve you as Corrigan did his wife, so great have been my provocations that a jury would acquit me;' but to myself he has said, 'I will yet serve you as Corrigan served his wife;' and also 'he has added, 'and if I do so no jury would condemn me;'" comparing this with the evidence of the children and Mr.

Bostock's own version, I am inclined to think his account of these alleged threats is the correct one.

The two servants who were then in Mr. Bostock's service had been so but for a short time, and knew very little of the quarrels that had occurred between him and his wife, but they both prove that Mrs. Bostock left him avowedly for the purpose of going to the seaside with her mother, without giving them any reason to suppose that she would not return.

Upon this evidence I have to say whether I think that the wife's person was in danger from the violence of her husband at that time. The angry expressions of the husband, whether amounting to threats or not, had been repeated on various occasions between February and June, and no act of violence during that time had been committed, nor do I believe that Mrs. Bostock was in danger of any such injury as she says she feared, or of any other bodily injury. I cannot upon that evidence be satisfied that Mrs. Bostock really entertained any such fears, and that she quitted her home in consequence of them: for her evidence on this point is far from candid; she had previously made an arrangement to accompany her mother at that time to Margate. Her statement on the seventeenth article is, that she left in consequence of her husband's threats, not daring to pass another night within his power, and with a determination never to return; but her answer to the thirty-ninth interrogatory, to which I have already adverted, gives a very different aspect to the case.

The result of this examination is, that I am satisfied that all quarrels between this excitable and unhappy couple had been from time to time arranged, and that so late as May, 1855, there was full condonation by the wife of any acts of cruelty of which her husband had been guilty, and that I am not satisfied that the wife had reasonable ground to apprehend bodily injury when she quitted her home, or that she did actually quit it under the influence of such apprehension. The history of the married life of these parties is most melancholy; for thirty years they have been continually quarrelling; they have brought up a large family of children, upon whom the example of their parents cannot have failed to produce injurious effects; but I cannot, because they make each other unhappy, decree that they shall be separated. To use the

1858.

July 19.

BOSTOCK
v.
BOSTOCK.

1858. language of Lord Stowell, in *Evans v. Evans*, 1 Consist. 36,
 July 19. "Everybody must feel a wish to sever those who wish to live
 BOSTOCK separate from each other, who cannot live together with any
 v. "degree of harmony, and consequently with any degree of
 BOSTOCK "happiness, but my situation does not allow me to indulge
 "feelings, much less the first feelings, of an individual; the
 "law has said that married persons shall not be legally se-
 "parated upon the mere disinclination of one or both to
 "cohabit together, the disinclination must be founded upon
 "reasons which the law approves, and it is my duty to see
 "whether those reasons exist in the present case." In my
 judgment such reasons did not exist at the time when this
 suit was instituted, and I must dismiss the husband from it.

July 30.

(Before the JUDGE ORDINARY.)

MARCHMONT
 v.
 MARCHMONT.

MARCHMONT v. MARCHMONT.

Judicial Separation by reason of Cruelty.—Mode of Trial.

The 28th and 36th sections of the Divorce Act leave it in the discretion of the Court to direct the issues in a suit for judicial separation to be tried by a jury; but the Court will generally make such order at the prayer of either party, and in the present case did so on the undertaking of the respondent not to interfere with or annoy the petitioner pending the suit.

This was a suit for judicial separation by reason of cruelty, brought by the wife against the husband; the petition had been filed in the course of the last month, and there was an answer and replication.

Dr. Deane, Q.C., for the petitioner, moved the Court to direct the cause to be heard by oral evidence without a jury, and to be pleased to name some early day. The latter part of the motion was founded on affidavits of the petitioner and others as to the state of her health, and apprehensions of interference or annoyance from her husband in endeavours to repossess himself of her by force.

Dr. Swabey, for the respondent, moved the Court to direct the cause to be heard before a jury, and relied on a counter-affidavit of the respondent as to there being no grounds to take the cause out of its regular order on the list.

1858.

July 20.

MARCHMONT
v.
MARCHMONT.

THE JUDGE ORDINARY: On comparing the 28th and 36th sections of the Divorce Act, I do not think you can, in a petition for judicial separation, demand a jury as of right; but I am much inclined to order a jury wherever either party asks it. In the present case, however, as this is not a matter of right to the husband, but in the discretion of the Court, I expect that the respondent will undertake not to annoy or interfere with the petitioner between the present time and the trial; and that must be made part of the order of the Court directing the mode of trial. I can name no particular day for this cause; it must come on in its due course.

(Before the JUDGE ORDINARY.)

CUDLIPP v. CUDLIPP.

July 19.

CUDLIPP
v.
CUDLIPP.

Petition for Judicial Separation.—Desertion.

A. left his home at Birkenhead in 1843, and left unanswered letters from his wife telling him that an execution was in the house. She was obliged to go into lodgings, and subsequently supported herself as a governess. In 1844 A. made by letter some vague offer of re-joining her, and in 1848 wrote, bidding her farewell for ever. The Court held that there was a wilful desertion of the wife in the winter of 1843-4, and no distinct offer afterwards to find another home.

This was a petition for a judicial separation brought by the wife by reason of the husband's desertion.

Dr. Twiss, Q.C., for the petitioner.

The citation had been served on the respondent at Loughborough, in Leicestershire, and an appearance had been entered, but no answer filed.

It appeared that the marriage took place in 1832. Mr.

1858.

July 19.

CUDLIFF

v.

CUDLIFF.

Cudlipp was an attorney at Birmingham, where he became embarrassed in his circumstances. In 1843, being then resident at Birkenhead, he went in the month of November to Birmingham, where, according to Mrs. Cudlipp's own evidence, she stopped a fortnight with him at an inn. She then, at his suggestion, went to a Miss Swinnerton's, in Staffordshire. The petitioner's evidence then continued to the following effect:—"He said he should come to me there soon. I remained there a fortnight, but he did not join me. I returned to our house at Birkenhead, where I found an execution in the house. I wrote several letters to my husband, but got no answer. The furniture was sold, and I went into lodgings, where I lived at the expense of my friends from December to the end of the next May, and then went out as governess. I have been in three different families as governess; I have supported myself. In the year 1848 I had a communication from my husband by letter, which is the last I received from him, and in which he bade me 'farewell for ever.'"

BY THE COURT: "When I left him to go back to Miss Swinnerton's, he gave me no intimation that he did not intend to return home. I have never seen him since. He once wrote, proposing to rejoin me in May, 1844; the letter was very vague. I answered, when he could place me in as good a situation as I could keep myself in by my own industry, it would be time enough to talk about that." Other witnesses proved that they went to Birmingham, at Mrs. Cudlipp's request, in January and February, 1844, and saw Mr. Cudlipp, with the object of inducing him to return to his wife. But he said it was not convenient, that he had debts to collect in Birmingham, and could not come away. Mr. Cudlipp had never since returned to his wife.

THE JUDGE ORDINARY: I think there was a wilful desertion of the wife in the winter of 1843-44. They had a home, and he refused to return to it. I was anxious to ascertain whether he had subsequently offered to provide a home, but by the petitioner's answer I gather that he never made any definite or distinct proposal or offer of another home. He

deserted the original home, and has provided no new one. I
make a decree for the separation.

1858.

July 19.

CUDLIFF

v.

CUDLIFF.

(Before the JUDGE ORDINARY.)

July 16 & 20.

THOMPSON v. THOMPSON.

THOMPSON

v.

THOMPSON.

Judicial Separation.—Desertion.—20 & 21 Vict. c. 85, sec. 16.

Where a husband, having failed in business in Leeds, went to London in 1842 in search of business, leaving his wife and children at her father's, and she neglected to answer his letters written during several months after he so went to London (though there was an interview between the parties in 1850):

Held, that to constitute wilful desertion on the part of a husband, his absence and cessation of cohabitation must be in spite of the wish of the wife, and that she must not be a consenting party to it. That the husband did not desert his wife by going to London in search of employment, and that the wife was a consenting party to the prolonged absence or separation, and not now entitled to a judicial separation on her petition by reason of desertion without just cause.

This was a petition for a judicial separation, brought by the wife against the husband by reason of his desertion. It appeared that the parties were married at York in 1838 without the knowledge of the wife's parents. They resided together for two years in Leeds, when he lost his situation as an engraver, and in 1842 took a provision store in the same city, but failed in that business, and sold off his stock in the course of a few months. His wife returned, with two children, to her father's house, and after that time the parties never cohabited, nor did the husband contribute to the support of his wife and children. The husband went to London, whence, during the remainder of the year 1842, he wrote four letters to his wife. In the two first, dated June the 8th, and August the 1st, he expressed great anxiety to hear from his wife, and entreated her to write to him. He stated he was in low spirits in consequence of being separated from those he loved most dearly, and that in thought he frequently reverted back to the pleasant scenes of their early days, and the pleasant hours

1858.
July 16 & 20.

THOMPSON
v.
THOMPSON.

they had spent together. He hoped that the time was not far distant when he should be able to maintain them all without the assistance of anyone, and that they should be comfortably settled together again; he had no fear that he should be able to obtain a situation shortly. It appeared the husband and wife had an interview in Leeds between the dates of these two letters, but she did not reply to either of the letters. In a letter, dated September the 19th, 1842, he commenced, "I really know not how to address you, as I have received no answer to my last letter; I think you treat me very unkindly for the situation I am placed in; I deserve a little notice from you." He then complained that she was cold to him when he last saw her at a Miss Conyer's house at Leeds, and requested she would write and explain why she had not written before; he then continued, "I think you are in duty bound to let me know how the children are: when I had plenty you were welcome to it; now I have nothing, I am treated thus. P.S. Though I have not mentioned it before, I have not forgot my kind love to you and the children, hoping they are well and will prove a credit to you." The fourth letter was dated October the 3rd, 1842:—"Dear wife,—As by this title I have still the prerogative to address you, I am at a strange loss how to account for your conduct towards me. I have written two letters, and you have deigned to answer neither of them. What can be your motive for such cool reserve I cannot divine; but let me tell you this is the third and last time of asking. If you will not write to me, you cannot expect anything more in the shape of correspondence from the person you should love. Let me request you will write and give an explanation, or at least charge me with something, that I may defend myself. . . . You may probably think that you are causing me some trouble, and punishing me by not writing; but mind and be cautious you do not punish yourself in the long run, for it's a long lane that has never a turn: perhaps fortune may yet smile upon me, then what will you say? I know you have some ill advisers, for I am sure your conscience and your better feelings could not let you act thus; but let me beg of you not to take their advice, but act according to your own feelings, and let me know what are

“your real sentiments towards me; for, although you are
 “under good protection at present, you may survive it, and
 “still there may not be sufficient left to maintain you and
 “your small family; then, I would ask, who would become
 “your protector and support in the time of need?”

1858.

July 16 & 20.

THOMPSON
 v.
 THOMPSON.

This letter was not answered, and Mrs. Thompson heard no more of or from her husband till the summer of 1850, one of the children having died in the interval; he then met her on her way to chapel, and inquired why she had not sent to him when his child had died. She answered, that he had done nothing for it when alive, and he could not do anything for it when dead. After her return from chapel, Mr. Thompson came to his wife's mother's house, intoxicated, and claimed his wife and surviving child; Mrs. Thompson asked him whether he had a house to take them to; he said he had plenty of money, and would come the next morning; his wife answered, “Come sober.” He did not return; and from that time to the present year, the wife had not seen or heard from her husband. She admitted that she had never attempted to renew the correspondence with her husband, or make any application to him to return to cohabitation.

Evidence was given that for the last thirteen years Mr. Thompson had been book-keeper to a firm at Huddersfield.

Dr. Middleton for the petitioner.

No appearance was given for the respondent.

Cur. adv. vult.

THE JUDGE ORDINARY: This case was heard the other day on the wife's petition for judicial separation, on the ground of the husband's “desertion without cause” for upwards of two years. This is a new ground for judicial separation; it is a new authority conferred on this Court, which takes a new jurisdiction created by the Divorce Act, not transferred from the old jurisdiction of the Ecclesiastical Courts. There is a difficulty in defining “desertion,” and cases may arise in which it would be very difficult to say whether the facts proved would fall within the meaning of the statute. Without attempting to lay down a precise definition of “deser-

July 20.

1858.

July 20.

THOMPSON
v.
THOMPSON.

tion," I think it undoubtedly must mean a wilful absenting himself by the husband ; and that such absence and cessation of cohabitation must be in spite of the wish of the wife ; she must not be a consenting party. As to the facts of the present case, it appears that the parties were living in Leeds, and went to York to be married without the consent, indeed without the knowledge, of her parents ; they returned to Leeds, and the marriage was kept secret, the wife living at her father's house, until in the course of a few months the latter discovered what the facts were, and required her to leave his house and go to her husband. He was then in a situation, which he afterwards lost. He then tried to establish a shop, but the business failed ; she returned to her father's, and he went to London in search of employment, and from that time the desertion is supposed to have commenced. But it appeared that he wrote to her from London a letter expressive of great affection and attachment, speaking of his prospects of getting a situation, and of their living together again. A few months after that, he had an interview with her at Leeds, when he said he had not yet succeeded in his undertaking, but still hoped to do so. It appeared at this interview that she was rather cold, and he tried to pique her by mentioning some lady in London who had made him a present. He returned to London and wrote another letter in very affectionate terms, speaking of the probability of his entering on an engagement at a small salary and hard work, but which he hoped might improve ; to that she returned no answer. He again wrote, expressing anxiety about her and his children, and praying her to remember that she was his wife and ought to communicate with her husband. This was unanswered, and he wrote a fourth letter in an angry tone, complaining of the other letters remaining unanswered, and saying that, if she took no notice of his letters, he must suppose that she no longer wished to be on any terms with him. I asked the petitioner why these letters were not answered ; she said the earlier letters were not answered because she was busy nursing her children, and that the last was insulting. There certainly were some expressions and allusions in it which had better have been omitted, but these were very frivolous reasons for a wife not to answer her husband's letters ;

and when I pressed her further, it came out that her father would have objected to her writing. And this seems to be the truth, that the father had never approved of the marriage, and when his daughter went to live with him, did not wish her to have any further communication with her husband. His absence was, in the first instance, a necessary absence to seek employment, having failed in Leeds; and, looking at the conduct of the wife, I cannot consider the continuation of that absence as desertion within the meaning of the statute, and must dismiss the respondent from the suit.

1858.

July 20.

THOMPSON
v.
THOMPSON.

CARGILL v. CARGILL.

July 24 & 29.

Judicial Separation.—Desertion for Two Years.—Offer to Return.—20 & 21 Vict. c. 85, s. 16.

CARGILL
v.
CARGILL.

Where the offence of desertion without cause for two years is once completed, the spouse deserted has, at least since the Divorce Act came into operation, a complete right to the relief given by the statute, although the other party may, subsequently to the two years, have made a *bonâ fide* offer to return.

SEMPLE, the same rule would apply to the wife's right to a dissolution of marriage by reason of adultery coupled with desertion, under the 27th section of the Divorce Act; but not to the "desertion" mentioned in sect. 21 as the foundation of an order for protection of the wife's property.

This was a suit for judicial separation at the suit of the wife, by reason of the desertion of the husband for two years and upwards without cause.

Dr. Deane, Q.C., and *Dr. Middleton*, appeared for the petitioner.

The husband gave no appearance.

It appeared on the evidence that the desertion commenced in December, 1850, but that in the early part of the year 1858 the husband wrote, proposing to return to cohabitation. To this offer the wife made no answer, but filed her petition for a judicial separation. Assuming such offer to be a *bonâ fide* offer on

1858. the part of the husband, the Judge Ordinary expressed a doubt
 July 24 & 29. whether it would not have the effect of terminating the "de-
 "sertion for two years without cause," mentioned in the 16th
 CARGILL section of the Divorce Act, and so bar the wife of the relief
 v. CARGILL. prayed. *Cur. adv. vult.*

July 29. THE JUDGE ORDINARY: This was a petition for judicial separation, on the ground of desertion by the husband without cause for two years and upwards. The petition was filed on the 12th of May, and the citation was served on the husband on the 14th. No appearance was entered for him. The marriage took place on the 7th of June, 1848; on the 2nd of December, 1850, the husband sent his wife back to her father's, with a letter accusing her of misconduct, of which not the slightest evidence was given, and declaring that he never would live with her again. He soon afterwards quitted his house, sold his effects, and went to Australia, and his wife never heard from or of him till March in 1858, when, having returned to England, he addressed a letter to her at her father's house from an hotel in London, proposing that they should live together again; the wife returned no answer, and filed the petition with which I have now to deal.

There is no doubt that the respondent deserted his wife for two years and more, nor is there any evidence of any cause for it; and the sole question is, whether her right to the relief, which the statute would otherwise have given, was taken away by his proposal to live with her again. Various remedies are, by different sections of the 20 & 21 Vict. c. 85, given to a wife deserted by her husband. The word "desertion" may not in all places mean the same thing; thus, by sect. 21, it is enacted that a wife deserted by her husband may at any time after such desertion apply to a magistrate or certain other authorities for an order to protect any property she may acquire by her own lawful industry, and property which she may become possessed of after such desertion; "and such magistrate, etc., "if satisfied of the fact of such desertion, and that the wife is "maintaining herself by her own industry or property, may "make an order," etc. In that section I apprehend that desertion means, not only that the husband has absented himself, but has left his wife unprovided for, and such desertion

must continue at the time of making the order, and a *bonâ fide* offer of the husband to return and provide for his wife would take away her right to have such an order made.

By sect. 27 a wife is authorized to present a petition praying that her marriage may be dissolved, on the ground that since the celebration thereof her husband has been guilty of adultery, coupled with desertion, without reasonable excuse, for two years and upwards. I think that in this instance the Legislature could never have intended that the wife should be deprived of the right to a dissolution of marriage which accrued on the expiration of the two years, by a subsequent offer on the part of her husband to return and cohabit with her. In such a case he certainly could have no right to call upon her to return to cohabitation with him, for by so doing she would have to condone the adultery of which he is supposed to have been guilty. I consider, therefore, that adultery, coupled with desertion without reasonable cause for two years, is a compound offence, giving a right of relief by dissolution of the marriage, no part of which could be blotted out without condonation by the wife. The 16th section gives a minor remedy for either part of this compound offence, viz. judicial separation for adultery, or for desertion without cause for two years and upwards: and I see no more reason for saying that the husband can obliterate either, when separate, without condonation by the wife, than when they are combined. Either, when committed, gives the wife a right to proceed, of which she cannot be deprived without her concurrence. This being my opinion as to the true construction of the statute, it is unnecessary to consider the terms of the letter addressed to her by her husband for the purpose of ascertaining whether it was written in good faith or not. Assuming that it was, I nevertheless hold that the wife is entitled to the remedy for which she has petitioned, and I decree a judicial separation.

1858.

July 29.

CARGILL

v.

CARGILL.

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1858.

July 29.

CARGILL.

v.

CARGILL.

C A S E S
IN THE
COURT OF PROBATE.

1858.

May 1 and
June 26.

In the Goods of ELIZABETH STONE JAMES (Widow,
deceased), on Motion.

In the Goods of
ELIZABETH
STONE JAMES.

Erasures.—Substitution.—Probate in Blank.—Practice.

The testatrix after the execution of her will erased certain parts thereof, substituting in their places other words. Probate granted of the will with those parts *erased* in blank, the original words not being discernible on the face of the paper, and there being no evidence to show what they were.

Elizabeth Stone James, the deceased in this case, died on the 21st of December, 1857, leaving a duly executed will, dated the 1st of August, 1850, whereof she appointed Samuel Blount, Esq., J. W. Williams, and "Mary Ann Johnson, her "faithful, trusty servant," executors.

There were several interlineations, erasures, and substitutions on the face of the will, and the amount of one of the legacies, and several other important words, as well as the words "*Mary Ann Johnson, my trusty servant,*" in the clause appointing executors, were written on erasures. There were no means of discovering what the words obliterated originally were, either by ocular inspection or by parol evidence.

Dr. Tristram, moved "for probate of the will in its present state to be granted to the said Mary Ann Johnson as "one of the executors named therein." He submitted that it might be inferred from certain observations which fell from the deceased when she executed the will, that the interlineations, erasures, and substitutions had been made by her prior

to the execution: and cited *Doe d. Shallcross v. Palmer*, 16 Q. B. 747. 1858.

May 1 and
June 26.

Dr. Deane, Q.C., for Mr. Blount and Mr. Williams, the other executors, opposed the motion, and prayed for probate of the will to be granted to Mr. Blount, as executor. In the Goods of
ELIZABETH
STONE JAMES.

SIR C. CRESSWELL was of opinion that the presumption was, that the interlineations, erasures, and substitutions had been made by the deceased subsequent to the execution of the will; and decreed probate of the will to Mr. Blount and Mr. Williams as executors named therein; the probate of the parts erased, and upon which certain words had been written by way of substitution, to go in blank.

NICHOLS AND FREEMAN v. BINNS.

*Will.—Habitual Insanity.—Evidence of Lucid Interval.—
Tests of Sanity.—Next of Kin.—Costs.*

1858.

July 26, 27, and
Aug 2.

W. P., who for many years had been afflicted with habitual insanity, accompanied with intermissions, executed a will when confined in a lunatic asylum. The instructions for it were designed and written by himself without assistance, and the will made a natural and equitable distribution of his property. Probate of the will was opposed by the next of kin on the ground of the testator being of unsound mind at the time of its execution. The executors contended that it was executed by him in a lucid interval. The jury having found a verdict for the executors, probate of the will was decreed:

NICHOLS AND
FREEMAN
v.
BINNS.

Held, that where a person afflicted with habitual insanity, with intermissions, makes a will, the fact that the will is a rational one and made in a rational manner, though not conclusive, is strong evidence of its having been made in a lucid interval.

That where a person is labouring under an insane delusion, his sanity is to be tested by directing his attention to the subject-matter of such delusion; but that where a person is afflicted with habitual insanity unaccompanied with delusions, his sanity is to be tested by his answers to questions, his apparent recollection of past transactions, and his reasoning justly with regard to them, and with regard to the conduct of individuals.

That the will in question was made under remarkable circumstances,

1858.
July 26, 27, and
August 2.
—
NICHOLS AND
FREEMAN
v.
BINNS.

and such as would have justified the next of kin in calling upon the executors to prove it in solemn form: that the next of kin having put the executors to a very expensive trial, although she had previously received from them full and complete information respecting its execution, was not entitled to have her costs out of the estate. The Court declined to make any order as to costs.

This was a cause of proving in solemn form the last will and testament of Mr. William Wiggett Parkinson, who died on the 27th of August, 1857, in the Heigham Hall Lunatic Asylum, Norwich, promoted by Nichols and Freeman, the executors named therein. The will in question was dated the 15th day of November, 1851, and was signed by the deceased during his confinement in the above-named asylum, and attested by three witnesses, two of whom, Dr. Rankin and Mr. Mills, were in the medical profession, and the third, Mr. Bishop, was curate of the parish of Heigham. Probate of the will was opposed by the defendants, H. B. Binns and Mary Ann, his wife, who was the niece and sole next of kin of the deceased, on the ground that at the time of its execution he was of unsound mind.

The plaintiffs admitted that the testator for some time before, and even after, the date of this will had been afflicted with habitual insanity, but alleged that during such period he had frequent intermissions of his mental malady, and that at the time of the execution of the said will he was in the enjoyment of a lucid interval. He left real and personal property to the amount of between £12,000 and £15,000.

He first became insane in 1840, and on the 5th of December in that year he was placed in an asylum called The Retreat, near Norwich. In August, 1841, he was found by an inquisition to have been of unsound mind without lucid intervals from the 5th day of December, 1840, and subsequently Mr. and Mrs. Freeman (the latter being his niece) were appointed joint committee of his estate and person. In 1847 he had so far recovered as to be able to be removed from The Retreat to the house of Mr. Freeman; he remained there until June, 1851, during which period he had occasional fits of insanity. In June, 1851, he again became insane, and was removed to Heigham Hall Lunatic Asylum, where he remained until his death in August, 1857.

In 1837 he married his brother's widow; he had no issue

by her, and she died shortly after the marriage. At that time his nearest relations were a nephew and two nieces, the children of his only brother Mr. Joseph S. Parkinson, namely, Joseph W. Parkinson and Elizabeth Sarah Parkinson, who in 1838 married Mr. Freeman, one of the plaintiffs, and Mary Ann Parkinson, who in 1840 married Mr. Binns, the defendant.

1858.
July 26, 27, and
August 2.
NICHOLS AND
FREEMAN
v.
BINNS.

On the 4th of February, 1837, he made a will, which was the next one in date preceding the will in dispute, by which, after giving his wife a life-interest in some property and making other specific devises and bequests, he devised one-third of the residue of his real estate to his nephew, the said Joseph W. Parkinson, absolutely; one other third to Mrs. Freeman, with a power of appointment, and in default of appointment to her for life, with remainder to her children, and for want of children, with remainder over to Mrs. Binns; and the remaining one-third to Mrs. Binns with a like power of appointment, and in default of appointment, to her for life, with remainder to her children, and for want of children, with remainder over to Mrs. Freeman. The residue of his personal estate he divided between his said two nieces equally.

In 1845, the testator's nephew, Joseph W. Parkinson, died a bachelor, and in January, 1847, his niece, Mrs. Freeman, died, leaving three children her surviving. By these deaths the interest of Mrs. Binns under the will of 1837 became greatly increased, and that of Mrs. Freeman's children diminished, Mrs. Binns being thereby entitled to the whole of the testator's residuary personal estate, and to one moiety of that portion of his real estate devised to Joseph W. Parkinson.

For some time previous to August, 1851, the testator was intent upon making a new will, and on the 4th of August of that year he expressed a determination to make a more equitable arrangement in regard to the disposition of his property, and on the same day drew up with his own hand, and without assistance, the following instructions for the preparation of a new will:—

“My will is that whatever amount of property I may die
“possessed of may, at my decease, be applied for the use and
“benefit of the three children which my late niece, Elizabeth
“Sarah Parkinson, bore to Mr. Charles Jeremiah Freeman,

1858. "her husband, in equal proportions. And also a like sum for
 July 26, 27, and "my niece, Mary Ann, the wife of Mr. Horace B. Binns, for
 August 2. "her absolute use and benefit, independently of any control
 NICHOLS AND "over the same by her said husband, and she having an only
 FREEMAN "child, a son, which she bore to her said husband, a similar
 v. "sum to be applied for his education and support until he
 BINNS. "shall attain to the age of twenty-one years, then the
 "amount to become his property absolutely and exclusively.
 "And my will is that each of these several five shares or divi-
 "sions of my property may be fairly and equitably made and
 "applied as directed above. And for the purposes of carrying
 "out and completely executing the intentions of this my will,
 "I hereby appoint as executors thereof with full powers."

On the 6th of August 1851 these instructions were by his request taken by Mr. Watson, at that time one of the proprietors of Heigham Hall Asylum, to Mr. Simpson, a solicitor in Norwich, who had formerly been concerned for the deceased. Mr. Watson added to the written instructions some verbal explanations as to the wishes of the deceased. Mr. Simpson prepared a draft will in accordance with these instructions, and on the following day took the draft to, and had an interview with, the deceased, when he, before reading or showing to him the draft, questioned him as to his intentions in regard to his will. The deceased said his previous will would not have the effect he wished, and stated what his wishes were (which coincided with his written instructions), and that he wished Mr. Nichols and Mr. Freeman to be his executors. Mr. Simpson also drew his attention to the fact of his being in an asylum, and told him it would be more likely to be effectual if he would copy it himself. He said he would try to do so, and the draft was left with him for that purpose. The deceased however felt himself unequal to the task. The execution of the will was deferred until the month of November following in consequence of the testator having in the meantime been subject to one of his ordinary recurrent fits of insanity. On the 5th of November he sent the draft to Mr. Simpson with a request that it might be engrossed for execution. Mr. Simpson acted thenceforward in the matter under the advice of counsel. The draft will was engrossed and executed by the testator on the 15th of November, 1851, having been first read over to, and approved of by

him, and was attested by two medical gentlemen, Dr. Rankin and Mr. Mills, and the curate of the parish, Mr. Bishop.

The three attesting witnesses, also Mr. Simpson, Mr. Nichols, and Mr. Watson, who were present at the execution of the will, and other persons, were examined in support of it.

By the will the testator appointed Mr. Nichols and Mr. Freeman executors, and devised all his real and personal estate to them upon trust to sell the real estate, and to stand possessed of the proceeds of such sale and of his personal estate upon trust, after payment of debts, as to one-fifth part, to lay out the same in the purchase of an annuity payable to Mrs. Binns for her life; as to one other fifth part, to stand possessed of the same for the child of Mrs. Binns on his attaining twenty-one, and during his minority to apply the income for his benefit, and in the event of his death under twenty-one, his one-fifth to go over to Mrs. Freeman's children; and as to the remaining three-fifth parts, and also the fifth part given over as aforesaid, to hold the same upon trust for Mrs. Freeman's three children in equal shares on their attaining twenty-one, with the right of survivorship between them in the event of any of them dying under age and unmarried.

The defendants called no witnesses.

THE ATTORNEY-GENERAL (*Sir Fitzroy Kelly*), *Dr. Addams*, Q.C., and *Mr. Hannen*, for the plaintiffs (the executors).

Mr. Collier, Q.C., *Honble. G. Denman*, and *Mr. Archibald*, for the defendants.

SIR C. CRESSWELL (to the jury): The question for your decision is, whether Mr. Parkinson, the deceased in this case, who is proved to have been insane at times and for long periods of time during many years, was in the enjoyment of a lucid interval when he executed this will.

Where a person is never shown to have been insane, the law presumes that he is sane; but if insanity is once proved to have been during a period of his life his normal state, it is necessary, in order to establish the validity of any act which he may have done during that period, to show that he was sane at the time of his doing that act.

1858.
July 26, 27, and
August 2.
—
NICHOLS AND
FREEMAN
v.
BINNS.

1858.
July 26, 27, and
August 2.

NICHOLS AND
FREEMAN
v.
BINNS.

I have referred to the case of *Cartwright v. Cartwright*,¹ which is a decision by Sir William Wynne in the Prerogative Court, and is one which has been frequently quoted. The testator in that case was a lady afflicted with permanent insanity, and living under restraint, but who was proved to have had intermissions of her complaint: she drew up, without assistance and in proper form, a will in her own handwriting; she was apparently, almost at the moment of preparing it, in considerable excitement; for she was seen at the time to write upon several pieces of paper and tear them up in a wild and excited manner and throw them into the fire; but the will in question appeared certainly to have been a right and natural will for her to have made, and was held to be a good will. Sir William Wynne in his judgment in that case is reported to have said:—"If it can be proved that this is a rational act "rationally done, the whole case is proved. What can you do "more to establish the act." But this expression of the learned Judge cannot be applied strictly to all cases. The mere fact that the act is rational, and done in a rational manner is not, I think, in itself conclusive evidence of sanity; although in every case it will be very strong evidence of sanity, tending greatly to satisfy the mind of a rational person that the party so doing that act was at the time in full possession of his senses. But after a paroxysm of insanity has passed away, insanity may still be lurking in the mind of the patient, although there is nothing apparent on the surface to show it.

It was argued by counsel in opposition to this will, that although when the deceased made it, *apparently* he was restored to sanity, yet that there might have still been insanity lurking within, which was not observable; and he told you of two or three remarkable instances, the traditions of the bar in Westminster Hall, in² one of which a great and experienced advocate cross-examined a witness a long time before he could discover that he was insane. He did not do so until he touched upon the subject upon which he laboured under a delusion. But in all those cases you will, I believe, find that the person was labouring under an insane delusion; and where this is the case, unless you discover what the delusion is, and bring the subject of his delusion under his attention, you

¹ 1 Phill. 90.

² Mr. Greenwood's case.

may not discover that he is insane. This will not apply to the present case, for there is no proof that the deceased was ever subject to any delusion. Indeed it appears according to the evidence of one gentleman, Mr. Nichols, who gave his evidence, I thought, very sensibly, that the deceased's was a case of recurrent mania, and that his existence was passed under three different sets of circumstances,—raving madness; depression, amounting to an insane state of mind; sanity. And Mr. Watson said, that as his bodily health became stronger, there was again an increased and inflammatory action of the brain, and again he became violent; then came another fit of depression, and then sanity, and so on in a regular course. But in no part of their evidence do they ever say there was anything like a delusion by which at any period they could test whether he was sane or not. It was therefore only by his answers to questions, his apparent recollection of past transactions, and his reasoning justly with regard to them, and with regard to the conduct of individuals, that any one could judge whether he was sane or not.

1858.

July 26, 27, and
August 2.NICHOLS AND
FREEMAN
v.
BINNS.

It appears that the deceased (and there is no doubt about this) had two nieces, one (Mrs. Freeman) who had always pleased, and the other (Mrs. Binns) who had disoblged him. Mrs. Freeman had three children, and Mrs. Binns had one. He had made a will in 1839, the arrangements of which were entirely defeated by the death of Mrs. Freeman and her brother; so that if no new will were made, nearly the whole of his property would have gone to the niece who had disoblged him, to the exclusion of those with whom he had always been satisfied, and upon whom he had bestowed a great share of his affection. It is also admitted that when he was removed from the first lunatic asylum in which he was placed, I mean Mr. Dalrymple's asylum, the house he went to was Mr. Freeman's. He went there and remained there for nearly four years (in the course of which he had occasional fits of insanity), and during that time there does not appear to have been any trace of friendly or kindly intercourse between him and Mr. and Mrs. Binns.

There is no doubt that the execution of this will was a very responsible transaction; and that a will prepared and executed in a lunatic asylum by a man not generally in possession

1858.
July 26, 27, and
August 2.

NICHOLS AND
FREEMAN
v.
BINNS.

of his faculties, ought to be regarded with great care and jealousy; but this should not be carried too far; for a person may be in a lunatic asylum because he is affected by a malady which makes it necessary that he should be placed under restraint, but who at times may be perfectly sane; and if he was prevented from disposing of his property according to his wishes it would be a great hardship upon him. I can fancy a case where such a person being conscious that he was labouring under restraint, and feeling that his property, if he did not make a disposition of it, would not go as he thought right and just, would be much affected if he thought that he could not otherwise dispose of it. We have some trace of this kind of feeling in the present case. Mr. Watson says, "The deceased frequently mentioned to him his family; and said he wished to make, if possible, a fresh and more even adjustment of his property, and that he mentioned the death of Mr. Joseph Parkinson and also of his niece, Mrs. Freeman, and said that in consequence of their death the whole would go to Mrs. Binns, which was not his wish or intention." Then, again, there is the remarkable circumstance spoken to by Mr. Nichols, that this annoyed him very much, and distressed and disturbed him, and that he was very anxious about it; that he knew his position,—that he was in a lunatic asylum,—and felt that there was a difficulty about making his will, and had asked him if it could not be done.

It is said that there is some little difference between the instructions and the will. But the will is substantially in accordance with the instructions; it was read over and explained to the testator, and he was perfectly satisfied with it.

In addition to this, you have the evidence of Mr. Nichols, Mr. Watson, Dr. Rankin, and Mr. Mills, whose characters are high in the profession to which they belong. Two of these gentlemen, Mr. Nichols and Mr. Watson, tell you that in the month of August, 1851, they saw the testator in the lunatic asylum, and that they had no doubt of his sanity at that time; and the other two gentlemen were called in for the purpose of ascertaining the state of his mind in November, and although they do not recollect the questions they put to

him,—Dr. Rankin says that he was with him for about three-quarters of an hour, and that he endeavoured to test his understanding,—and they both say that they were perfectly satisfied of his competency at that time.

1858.
July 26, 27, and
August 2.

At the conclusion of the learned Judge's charge, the jury having retired for a few minutes found by their verdict that the will was made by the deceased in a lucid interval.

NICHOLS AND
FREEMAN
v.
BINNS.

Mr. Collier, Q. C., submitted that the defendant's costs ought to come out of the estate.

SIR C. CRESSWELL: I will consider the question. My present impression is that it is almost an undefended case.

Mr. Collier: I did not call witnesses in the exercise of my own discretion.

SIR C. CRESSWELL: It really will not make much difference to the defendants. They have two-fifths and the other party have three-fifths of the residue. If I allowed costs at all to come out of the estate, your parties would have to pay two-fifths of them.

Cur. adv. vult.

Dr. Addams, Q. C., moved for probate of the will. He understood that an application would be made on the part of the defendants to have their costs paid out of the estate. He should oppose the application. The defendants had so conducted their opposition to the will as to put the estate to great and needless expense. Moreover, they knew beforehand what the case of the executors was; for it appeared in the evidence that early in the progress of the cause, the defendants' attorney had subjected Mr. Watson (the proprietor of the asylum in which the testator had been confined since 1851) to an examination which lasted for three hours, and that during such examination he had answered all the questions put to him, and had given him every information in his power. Under these circumstances he submitted that the Court ought to reject the application.

August 2.

Hon. G. Denman, for the defendants: This is one of those

1858.
August 2.
—
NICHOLS AND
FREEMAN
v.
BINNS.

cases in which the next of kin had reasonable cause for putting the executors on proof of the will, and they ought to have their costs out of the estate. The will was made in a lunatic asylum, at a time when the next of kin had no access to the testator. It was made without her knowledge, and she never heard of it until six years after it was made. If she had had earlier information of its execution she could have then instituted inquiries which might have averted the present suit. The defendants had not called any witnesses, because their witnesses could have spoken to the state of the testator's mind only before and after the execution of the will, and this part of their case was proved by the plaintiff's witnesses. It was admitted by the plaintiffs, that the testator before, and at the time of his death had been affected with permanent insanity; but they contended, and the jury found, that the will was made during a lucid interval. In deciding under such circumstances, whether the next of kin had or had not just cause for putting the executors on proof of the will, the Court would bear in mind the difficulties attending proof of a lucid interval in cases of permanent insanity. In *Brogden v. Brown*, 2 Add. 444, Sir John Nicholl said:—"In cases of permanent proper insanity, the proof of a lucid interval is matter of *extreme* difficulty, as the Court has often had occasion to observe, and for this, among other reasons, namely, that the patient so affected is, not unfrequently, *rational* to all *outward* appearance, without any *real* abatement of his malady; so that, in truth and substance, he is just as insane in his apparently rational, as he is in his visible raving fits." This is one of those cases in which it might be said that there was a just cause of suspicion, whether the testator when he made his will, though *apparently* rational, was not *really* insane. Under these circumstances he submitted that the costs should come out of the estate.

SIR C. CRESSWELL: In the first place, I decree probate of the will.

The question of costs is a very important one. There has been a great difference between the practice of the Ecclesiastical Courts and the practice of the Courts of Common

Law on this point. If an executor or an heir-at-law enter into a contest at common law as to the validity of a will, they do so at the risk not only of not receiving, but of paying costs. The Courts of Common Law have no power to give costs out of the estate. But by the practice of the Ecclesiastical Courts, where there was a fair case for inquiry, the next of kin might call on the executors to prove the will in solemn form, and, generally speaking, at the expense of the estate. This I understand has gone so far, that they had a right¹ to insist upon certain witnesses being called, to give them an opportunity of examining them. I am not inclined to enlarge this rule.

In the present case there is no doubt that the will was executed under very remarkable circumstances. I am not surprised at Mrs. Binns resisting it, and I think she would have been perfectly justified in calling upon the executors to prove it in solemn form. The three attesting witnesses, two of whom were highly respectable medical men who had previously made themselves acquainted with the testator's condition, and the other the curate of the parish, must then have been called, and she would have had an opportunity of cross-examining them. It does not appear that Mrs. Binns made any application to them for information which was withheld. And further, when the contest was embarked in, Mr. Watson, under whose care the lunatic was, and who would be able to give the best information as to his state of mind, submitted to an examination for three hours by Mrs. Binns's solicitor. There is no pretence for saying that any information which Mrs. Binns asked for was withheld. Under such circumstances, if the next of kin chooses to go to the expense of such a trial as took place last week, I cannot make the estate bear her costs. I do not condemn her in costs, which would have been the case in a Court of Common Law. I make no order as to costs.

1858.

August 2.

NICHOLS AND
FREEMAN
v.
BINNS.

¹ See *Cartwright v. Cartwright*, 1 Phill. 94.

1858. In the Goods of EDWARD GREVES (deceased), on Motion.

December 3.

Will.—Incorporation.

In the Goods of
EDWARD
GREVES.

The Court will not extend the principle of incorporation as laid down by the Privy Council in *Allen v. Maddock*.

Edward Greves made his will bearing date the 22nd day of April, 1856, but did not appoint any executor thereof.

In the fifth sheet of the will the following clause appears: "And I also give to the said Sarah Florence some household furniture, to be delivered to her in one week after my decease, which she has got a list of, if she lives with me at the time of my death."

At the time the will was executed, the list referred to was not produced.

Sarah Florence deposed that the testator, about the year 1852, on making a former will, stated to her (she being at that time his housekeeper), that it was his intention to leave her some portion of his furniture, and that thereupon he handed to her a list of such furniture, which he desired her to keep. The list was in the testator's own handwriting, and began, "List of goods I give to my godson, Edward Florence," and ended thus, "my violin and clarionets." That on the testator executing his last will, on the 22nd of April, 1856, he again requested Sarah Florence to keep this said list, which she had then in her possession, and that she did so until his death. She further deposed that the deceased never gave her any other list, and that she believed the same to be the one referred to by the deceased in his will, and intended by him to be a bequest to her.

John Edward Florence, mentioned in the above list, was an illegitimate son of the deceased by the said Sarah Florence.

Dr. Wambey moved "for letters of administration with the said will, and also the said list of furniture annexed, as together containing the will of the deceased, to be granted to A. Greves, the residuary legatee named in the will." This list was the only one given to Sarah Florence by the deceased, and it was in existence prior to the execution of

the will. He submitted that the identity was sufficiently proved. *Croker v. The Marquis of Hertford*, 4 Moore P. C. R. 339; *Haynes v. Hill*, 1 Rob. Eccl. Rep. 795.

1858.

December 8.

In the Goods of
EDWARD
GREVES.

SIR C. CRESSWELL:—The question to be decided is not whether there are grounds for conjecturing that the testator referred to the list produced, but whether it is proved by legitimate evidence that he did so. The doctrine as to incorporation was very fully discussed in the Privy Council in the case of *Allen v. Maddock*. The list purports to be a list of certain property intended by the testator to be given to another person, and it does not correspond with the one mentioned in the will. If I granted the motion, I think I should be extending the principle laid down by the Privy Council in the case I have referred to, and this I am not inclined to do, although I entirely concurred in that decision.

Motion rejected.

WARE AND GROVE v. CLAXTON AND CLAXTON.

December 23.

Pleading.—Practice.—Leave to amend.—Conditions.

WARE & GROVE
v.
CLAXTON &
CLAXTON.

B. died in May, 1850, leaving a will, dated May, 1849, and two codicils dated May, 1850. Probate of these papers was taken in common form in July, 1850. In April, 1858, two legatees under the will intimated their intention of disputing the two codicils; whereupon the surviving executors commenced a suit and filed their declaration on the 25th of June. On the 21st of July the defendants filed pleas: first, alleging that the codicils were unduly executed; and secondly, that the testator was of unsound mind at the time of their execution. On the 18th of November the plaintiffs set the case down for hearing, but it had not come on for trial. The defendants now, on the affidavit of their solicitor, applied for leave to amend their pleas by inserting similar pleas as against the will, on the ground that since the pleas were filed, their solicitor had received information impeaching the validity of the will. The Court, *hesitanter*, allowed such amendment, on condition of a portion of a legacy already received by one of the defendants being brought into Court, the costs of the motion being paid, and the pleadings amended within a week.

This was an application for leave to amend the pleas.

The testator died in May, 1850, leaving a will, dated 17th

¹ 11 Moore, P.C.

1858. May, 1849, and two codicils, dated respectively 16th and 17th
December 28. of May, 1850, whereby he appointed his wife Susannah Claxton, and the plaintiffs, executors. Probate of these papers was granted to the executors in 1850. The defendants were legatees under the will, and though the pecuniary legacies were not due till after the widow's death, George Claxton had received certain sums on account of his legacy; and Thomas Claxton and Ann his wife had, by indenture dated the 26th June, 1852, assigned over their legacies. Mrs. Claxton, the widow, died in February 1857, and in April, 1858, the surviving executors received a letter from the defendants' solicitors, intimating that they disputed the validity of the two codicils, which led to the institution of the present suit. On the 25th of June the plaintiffs filed their declaration; and on the 21st of July the defendants filed their pleas: first, that the codicils were not executed according to the provisions of 1 Vict. c. 26; secondly, that the testator, at the date of the alleged codicils, was not of sound mind, memory, and understanding.

WARE & GROVE
v.
CLAXTON &
CLAXTON.

The defendants, in their affidavit of scripts, admitted the validity of the will. On the 18th of November the plaintiffs set the cause down for trial, and filed notice. The summons, on which the present motion was originally founded, was on behalf of the defendants, "to shew cause why the defendants "should not be at liberty to amend their pleas herein (notwithstanding the cause has been set down for trial) by adding two "additional pleas similar in form to those already filed against "the alleged codicils, so as to raise the question of the due "execution of the alleged will, and the capacity of the testator "at the time of the alleged execution or date thereof."

Mr. Field now moved the Court accordingly, on an affidavit made by the defendants' solicitor, of which the following were the important paragraphs:—4. That this cause had been set down for trial during the present sittings, but he had been informed that it could not come on for trial during such sittings. 5. That after the pleas were delivered, namely in the month of November last, he obtained information which induced him to believe that not only the codicils of the testator, but also his will, were not duly executed; and if he had re-

ceived the information he now possessed before the pleas had been delivered, they would have been prepared so as to raise the question of the validity of the will as well as of the two codicils. 6. That in consequence of such information, he took an opinion of counsel, and was advised by him that it was necessary, in order to contest the validity of such will, to amend the pleadings by adding two pleas against the alleged will, similar in form to those already pleaded against the alleged codicils, so as to raise the question of the due execution of the alleged will, and the capacity of the testator at the time of the alleged execution or date thereof.

1858.

December 23.

WARE & GROVE
v.
CLAXTON &
CLAXTON.

Dr. Addams, Q.C., contra.—At least the Court will order the money received by one of the defendants under the will to be brought in, before it grants such a motion.

SIR C. CRESSWELL: I have great difficulty in granting this motion at all; and apart from the question of time, there is another consideration, whether there is now any satisfactory ground laid for the proposed proceeding. The affidavit of the solicitor is very loose, and gives me very little opportunity of being satisfied of the *bona fides* of the application. I am, however, always exceedingly unwilling to shut out any matter that parties wish to bring before the Court or a jury. I can detect nothing like a vexatious intent in the present application, otherwise I should certainly have refused it. On condition that any legacies received are brought in, the costs of the present motion paid, and the pleadings amended within a week from this date, I grant the motion.

In the Goods of her ROYAL HIGHNESS the DUCHESS D'ORLÉANS (Widow, deceased), on Motion.

1859.

January 13.

Administration with Will annexed.—Foreign Grant to Minor.
—Practice.

In the Goods of
Her R. H. the
DUCHESS
D'ORLÉANS.

The Court will not follow the grant of the country of domicile when it would, by so doing, be acting in contradiction to the law of this
VOL. I.

1859.

January 13.

In the Goods of
Her R. H. the
DUCHESS
D'ORLÉANS.

country. An application for a grant of letters of administration to a minor, assisted by his uncle, his curator, lawfully appointed according to the law of the domicil, refused.

This was a question of granting letters of administration, with the will annexed, of the late Duchess d'Orléans, in accordance with the grant which had been made in France, the country of the deceased's domicil, as acquired by her marriage, and not lost by her compulsory residence out of France under the decree of the French Republic of the 26th of May, 1848.

The QUEEN'S ADVOCATE (*Sir J. D. Harding*), (*Dr. Spinks* with him,) moved the Court to decree letters of administration (with an official copy of the will annexed) of the personal estate of the testatrix in England, as having had, at the time of her decease, a legal domicil in France, to be granted to his Royal Highness Louis Philippe Albert d'Orléans, Count de Paris, a minor, assisted by his uncle, his Royal Highness Louis Charles Philippe Raphael d'Orléans, Duke de Nemours, his curator lawfully appointed at a family council, held at Paris, on the occasion of his emancipation to assist him (according to the law of France), and to her Majesty Marie Amélie, Princess of the Two Sicilies, widow of his Majesty Louis Philippe, deceased, the grandmother and the lawful guardian, according to the law of France, of his Royal Highness Robert Philippe Louis Eugène Ferdinand d'Orléans, Duke de Chartres, a minor, for his use and benefit, and until one of them shall attain the age of twenty-one years, the said Count de Paris and the Duke de Chartres being the only children of the testatrix and the residuary legatees named in the said will.

SIR C. CRESSWELL: There is no difficulty whatever about the domicil. I am quite satisfied that the domicil of the Duchess continued to be French, and that this paper is a valid will. But although, in these cases, the Prerogative Court has followed as far as possible the practice of the Court of the country of the deceased's domicil, is there any instance of its having so acted in contradiction to English law? In this country the minor is under a disability. There seems to be no instance of its having granted administration to a minor,

who cannot take upon himself the liabilities which the law casts upon an administrator—he cannot, for instance, execute a bond.

1859.
January 13.

The Queen-dowager's claim is beyond doubt. I think the Count de Paris should follow the usual practice and elect his next of kin, her Majesty Marie Amélie, his grandmother, to be his guardian for the purpose of taking administration on his behalf. The grant of administration may then be made to her Majesty the Queen-dowager, as guardian of both the Count de Paris and the Duke de Chartres.

In the Goods of
Her R. H. the
DUCHESS
D'ORLÉANS.

In the Goods of JANE THOMAS (Widow, deceased), on Motion. Jan. 13 and 17.

Will.—No Attestation Clause.—Presumption of Execution.

In the Goods of
JANE THOMAS.

A. made her will in 1842; at her death there appeared the names of three subscribed witnesses, but no attestation clause. The only surviving witness, whose name stood first of the three, stated that the testatrix signed the will in his presence only; that he suggested the necessity of two witnesses, but could remember no more particular circumstances.

Held, that the presumption of due execution was not rebutted by the affidavit of the surviving witness.

In this case the will of the deceased bore date the 10th of October, 1842. By it Jane Burnet, wife of James Burnet, formerly Jane Bishop, spinster, was appointed executrix. The signature was attested by three witnesses, but there was no attestation clause. The signatures appeared under the word

“ Witness,

“ Benjamin Franklyn,

“ John Skeggs,

“ Mary Skeggs.”

B. Franklyn, a spirit merchant at Plymouth, deposed on affidavit that he remembered being requested by the testatrix to attest her signature to the will, and that she did sign her name in his presence, and that he thereupon subscribed his name in her presence; “ and further, that after the interval “ of so many years he was unable to recollect exactly all the

1859. "circumstances attending his so subscribing the said will; but,
 Jan. 13 and 17. "as well as he remembered, the testatrix and he were the only
 In the Goods of "persons present at such time, and the signatures of John
 JANE THOMAS. "Skeggs and Mary Skeggs, which now appear subscribed to the
 "said will immediately under his signature, were not so sub-
 "scribed in his presence. He remembered that he made a
 "suggestion to the deceased, at the time he subscribed the will,
 "that another witness ought to be present, but what further
 "passed on the subject he was unable to recollect. That he
 "had no knowledge whatever whether the testatrix afterwards
 "acknowledged the signature of the said will in the presence
 "of the said two witnesses whose names appeared subscribed
 "thereto, or of the circumstances under which such witnesses
 "so subscribed the said will."

John Skeggs and Mary Skeggs were since dead. They were people of some consequence at Devonport. Their handwriting was spoken to by two witnesses.

Dr. Spinks moved the Court to decree probate of the will to the executrix therein named. He cited the remarks of *Dr. Lushington* in *Burgoyne v. Showler*, 6 Rob. Eccl. Rep. 10: "If a party is put on proof of a will he must examine the attending witnesses. On the present occasion there are two subscribed witnesses; if these persons were dead, the law would presume the will to be duly executed," etc. He submitted, that though *Franklyn's* affidavit made his signature unavailing, yet the presumption would now be that the testatrix afterwards duly acknowledged the signature in the presence of Skeggs and his wife, and that they duly subscribed their names.

SIR C. CRESSWELL: I cannot at present grant this motion. The presumption which would arise on the face of this paper with regard to the three subscribed names, is in part rebutted by the affidavit of *Franklyn*. Does the rest of the presumption hold good as to the other names? They have not the appearance of being written in the same ink. *Cur. adv. vult.*

January 17. SIR C. CRESSWELL: I think I may fairly assume that the will was duly executed. The first subscribed witness

who survives states in his affidavit that he explained to the testatrix that two witnesses were required to be present at the execution of a will, and it appears that some time afterwards the testatrix obtained the signature of two other witnesses. It is a fair presumption, that she acted upon the information given to her, and got these two last witnesses to attend in order that she might acknowledge her signature in their presence.

1859.

Jan. 13 and 17.

In the Goods of
JANE THOMAS.

Probate granted.

In the Goods of FREDERICK WAINWRIGHT (deceased),
on Motion.

1858.

November 19.

*Administration.—Death of Husband and Wife.—Uncertainty as to Survivorship.—Form of Oath.*¹

In the Goods of
FREDERICK
WAINWRIGHT.

F. W., perished with his wife and only child, an infant, in the Cawnpore massacre, leaving no will. There being no evidence as to survivorship, the Court granted administration of the personal estate of F. W., as having died a widower, to his mother, as his next of kin. The administrator's oath, instead of being in the usual form, may state that there is no reason to believe that the wife survived the husband.

Frederick Wainwright, a lieutenant in her Majesty's 32nd regiment of foot, perished in the massacre at Cawnpore, on the 27th of June, 1857, leaving no will. It appeared from the official returns that he, his wife, and only child, were all massacred on or about the 27th day of June, 1857, but which of them died first or whether any of them survived the others, could not be ascertained. These facts were deposed to in an affidavit made by the mother of the deceased, who was a widow.

Dr. Twiss, Q.C., moved the Court to grant administration to the mother, dispensing with the usual words of the oath, that the deceased died a widower, without child.

SIR C. CRESSWELL: As there is no evidence to show that the deceased's wife survived, I think administration may go as prayed.

Motion granted.

¹ See next case :—In the Goods of Lieutenant-Colonel Ewart.

1859.

In the Goods of Lieutenant-Colonel EWART.

June 8.

Dr. Phillimore moved for administration of the effects of the late Lieutenant-Colonel Ewart to be granted to E. C., his next of kin. The deceased, in June, 1857 left Cawnpore in a boat, accompanied by his wife and several other Europeans, who were all under the protection of Nana Sahib; and whilst proceeding down the Ganges, the boat was attacked, and the deceased and his wife (with the rest on board) perished. There was no evidence to show which of the two survived, and he must therefore ask the Court to direct that the administrator should not be required to swear that the deceased died a widower according to the usual form of the oath.

SIR C. CRESSWELL: I will grant the motion. With regard to the form of the oath to be taken, it may state that the deceased and his wife perished at the time named, and that¹ there is no reason to believe that the wife survived her husband.

January 24.

SCOTT v. SCOTT.

SCOTT v. SCOTT. *Will.—Undue Execution of a later Will.—Destruction of the former Will.—Revocation not sustained.*

A will was destroyed by the testator, on the supposition that he had substituted another for it, but which was not duly executed. Probate of a copy of the first will granted.

The deceased in this case died on the 6th of December, 1857, having duly executed a will dated the 21st of February, 1852 (appointing his brother, John Scott, executor), and a codicil, dated the 25th of May, 1854. On the 20th of August, 1857, the deceased signed his name to a document, purporting to revoke this will and codicil. After he had executed this document a suggestion was made to him that he might burn the previous will and codicil, inasmuch as he had made a new one, when he observed, "I suppose there is no use in keeping the old ones, as I have made a new one;" and ac-

¹ Or that, after making inquiries, he had no reason to believe that the wife survived her husband.

cordingly burnt them. It subsequently turned out that the document, dated the 20th of August, 1857, was not duly executed. 1859.
A declaration was filed, propounding copies of the will dated the 21st of February, 1852, and the codicil dated the 25th of May, 1854; but inasmuch as the facts of the case were not disputed, both parties agreed to take the opinion of the Court on motion, and that the costs should come out of the estate. January 24.
SCOTT v. SCOTT.

Dr. Addams, Q.C., on the part of the plaintiff, after stating the facts of the case, and that by the affidavits it was proved that the will dated the 21st of February, 1852, and the codicil dated the 25th of May, 1854, were duly executed, and that correct copies of them were before the Court, submitted that the deceased had only destroyed these papers on the supposition that the later will was valid, and duly executed; and that, as that was not so, they were entitled to probate.

Dr. Deane, Q.C., for the parties interested in an intestacy, submitted to the decision of the Court.

SIR C. CRESSWELL: The construction put upon this transaction by *Dr. Addams* is, I think, the correct one. There is no reason to doubt the truth of the affidavit. I must take the fact to be that the deceased having, as he supposed, duly executed a second will, said, "Now I have executed this will, the former will and codicil are of no use;" and destroyed them. He intended only to destroy the first will in substituting another for it. The first will and codicil, therefore, are entitled to probate.

In the Goods of CHRISTOPHER DODGSON (deceased), on February 16.
Motion.

A Grant of Administration limited to carry on a Suit in Chancery and to receive a particular Fund, the Subject-matter of the Suit.

In the Goods of
CHRISTOPHER
DODGSON.

Where a party applying for administration has no direct interest in the personal estate of the deceased, but only as assignee of part of it,

1859. he cannot obtain a grant extending to the whole of the deceased's
February 16. property; the grant must be limited to the particular fund to which
he is entitled.

In the Goods of
CHRISTOPHER
DODGSON.

The deceased, Christopher Dodgson, having been an idiot from his birth and so found by inquisition, died on the 11th of June, 1858, entitled to some money in Chancery.

Robert Dodgson, who was the father and next of kin of the deceased, had, during the lifetime of his son, assigned all the right and interest in the property which would devolve to him at his son's death to Richard Davies, as a security for a sum of money. On the 13th November, 1858, administration of the effects of the deceased, under the usual limitations, for the purpose of appearing upon and supporting a petition to the Court of Chancery, was granted by the Court of Probate, on motion, to a nominee of Richard Davies, in default of the appearance of Robert Dodgson to a citation served upon him. When, however, application was made for payment of a sum of £4743. 11s. 8d., £3 per cents., standing in the name of the Accountant-General of the Court of Chancery to the account of the deceased, to the administrator of his effects, the registrar of that Court objected to draw up an order for payment, unless letters of general, and not merely limited, administration were produced. On the 28th January last the Lords Justices, to whom the matter was referred, supported the objection.

Dr. Phillimore, Q.C., now applied for a grant of administration of the effects generally, without limitation, of the deceased to be made to Richard Davies or his nominee. He admitted it was contrary to the usual practice.

SIR C. CRESSWELL: A general administration is out of the question, for Mr. Richard Davies has no interest whatever in the personal estate of the deceased, except as assignee of the father, Robert Dodgson. The Lords Justices say that the administrator appointed has only authority to carry on the Chancery suit, and no right to receive the fruits of it. Perhaps, therefore, it will answer the purpose if I alter the words of the previous decree, so as to authorize the administrator not only to carry on the suit, but to obtain the sum of money

in dispute. The most convenient course will be to revoke the administration already issued, and to make a fresh grant to the nominee of Mr. Davies, limited to carry on the suit in Chancery, and to receive the particular fund assigned by Mr. Robert Dodgson, the subject-matter of that suit, namely, £4743. 11s. 8d., £3 per cent. consols, standing in the name of the Accountant-General of the Court of Chancery to the account of Christopher Dodgson, deceased, together with the interest thereon. Let the grant issue in that form. I do not think that it is necessary to cite the father a second time.

1859.

February 16.

In the Goods of
CHRISTOPHER
DODGSON.

In the Goods of JOHN HOLGATE (deceased), on Motion.

February 16.

Will.—Imperfect Recollection of the attesting Witnesses.— In the Goods of
Presumption of due Execution.—Probate. JOHN
HOLGATE.

A will, in the handwriting of the deceased, admitted to probate, although the attesting witnesses did not recollect whether it was signed by the testator, or his signature acknowledged in their presence.

The deceased, John Holgate, died on the 13th September, 1858, leaving a will in his own handwriting, which terminated thus :—

“ This 15th day of August, 1851.

“ Signed by me, John Holgate, the testator, as and for his
“ last will and testament. In the joint presence of us present
“ at the same time, who in his presance, at his r^equest, and in
“ the pres^ence of each othior, have her^e unto subscribed our
“ names as witnesses.

“ JOHN HOLGATE.

“ JOHN HODGSON. HENRY GUY.”

The attesting witnesses in their affidavits stated “ that they
“ signed the paper at the request of the testator, who said
“ when he brought it to them, ‘ I want you to sign this,’ or
“ ‘ Put your name to this,’ or words to that effect, but they
“ could not recollect the exact words ; that they were both
“ present at the time, and subscribed the will in the testator’s

1859. "presence; that they could not say positively, whether the
 February 16. "said will was signed when he, the testator, brought it to
 In the Goods of "them or not, but to the best of their recollection and belief
 JOHN "it was, though they could not recollect whether he signed it
 HOLGATE. "in their presence or not, their impression being that he did
 "not, but that it was signed when he first brought it to them;
 "that the signature was in the handwriting of the deceased;
 "that, to the best of their recollection, the testator did not
 "mention that the said paper he so requested them to sign
 "was his will, but they could not be sure that he did not, but
 "they then thought and considered it was his will." The will
 was executed at the house of the witness John Hodgson, and
 shortly afterwards was handed by the testator to his daughter,
 in whose custody, or in that of her husband, it remained until
 after the death of the testator.

Dr. Middleton cited *Faulds v. Jackson* (6 N. C., App. 1),
 and submitted that the evidence of the witnesses, and the
 position of their signatures, established that if the testator
 did not sign his name in their presence, his signature must
 have been seen by them when they subscribed their names.

SIR C. CRESSWELL: The witnesses cannot recollect whether
 the testator brought it signed, or signed it in their presence.
 In either case it is entitled to probate. *Probate granted.*

February 23. In the Goods of ROBERT DAVY (deceased), on Motion.
 In the Goods of *Will.—Codicil.—Clerical Error by the Attorney who prepared*
 ROBERT *the Codicil.*
 DAVY.

The deceased duly executed a will, wherein he named three persons
 executors; he subsequently instructed his attorney to prepare a co-
 dicil to this will, for the sole purpose of altering two bequests therein
 contained. The attorney, in drawing the codicil, concluded with the
 following paragraph, "and in all other respects I *revoke* my said will,"
 intending to have written for the word "*revoke*," "*confirm*."
 The codicil was read over to the deceased, and executed with the clause
 as originally drawn.

Held, that there was not sufficient ambiguity on the face of the codicil to authorize the admission of parol evidence of the deceased's intention.

1859.

February 23.

In the Goods of
ROBERT
DAVY.

The will of the deceased commenced :—" First, I appoint my daughter Sarah Davy, my friend John Curson, of Hethersett, bricklayer, and my son Alfred Davy, executrix and executors of this my will." It then disposed of certain cottages and other property amongst the deceased's children and grandchildren, and concluded : " I give to my son Robert Davy and to my son Alfred Davy the sum of £150 each, for their own proper use and benefit respectively ; and as to all the rest, residue, and remainder of my money, household furniture, etc., and generally of all my personal estate and effects, whatsoever and wheresoever, I give and bequeath the same unto my said daughter Sarah Davy for her own sole and absolute use and benefit." The will was dated the 9th of December, 1857. The codicil commenced :—" This is a codicil to the last will and testament of me, Robert Davy, of Hethersett, in the county of Norfolk, gentleman, which will bears date on or about the 9th December, 1857." It then altered a bequest contained in the will, to a legatee who had died, and continued—" And whereas I have by my said will given and bequeathed to my said son Robert Davy a sum of £150 ; now inasmuch as my said son Robert at this time stands indebted to me in a sum of £50 for money lent and for beasts sold him, I do hereby revoke the said legacy of £150, and in lieu thereof I do hereby give and bequeath to my said son Robert a legacy of £100, to be paid within six months after my decease ; and I do declare and direct that my said executors shall not require a payment of the said sum of £50, or any part thereof, so now due from my said son Robert ; and in all other respects I *revoke* my said will." This codicil was dated the 16th of November, 1858. Mr. John Pilgrim, the solicitor who prepared it, in his affidavit, stated that on the 6th of November Mr. Davy called upon him, and gave written instructions for the preparation of a codicil to his will ; that on the 16th of November he received a message, purporting to come from the said Robert Davy, to the effect that he was taken unwell, and wished the codicil to be immediately forwarded to him for execution ; that he ac-

1859. cordingly prepared the codicil in accordance with the instructions, and, as he usually did in preparing a codicil to a will, he intended to add the words, "and in all other respects I confirm my said will," but that instead thereof he inadvertently and by mistake added, "and in all other respects I revoke my said will;" and without having observed the mistake, he delivered the codicil to his clerk to take the same to the deceased; that the whole of the codicil was drawn in pursuance of the instructions of the said Robert Davy, save and except that he received no instructions to insert, and by mistake, and contrary to the expressed intentions of the said Robert Davy, he inserted the sentence, "And in all other respects I revoke my said will;" but he was not aware of the mistake, nor does he believe any one else was, until after the death of the said Robert Davy. Thomas Skiffins, one of the attesting witnesses, read over the codicil of the deceased previous to the execution of it, but neither he nor the deceased observed the clause of revocation.

February 23.
In the Goods of
ROBERT
DAVY.

Dr. Spinks moved the Court to rectify the error in the codicil, and to decree probate of the will and codicil to the executors named in the will. The codicil was an absurdity as it stood, for the only bequests in it were alterations in the will.

SIR C. CRESSWELL: The rule is, the last words of a will and the first words of a deed must prevail. The testator may have meant this:—"I alter the destination of the property devised by the codicil, but as to all the rest I die intestate." I must reject the first part of the motion and leave it to another Court to decide what effect the codicil has upon the will.

But the testator gives directions as to what his executors are to do, thereby implying that their office still exists, and I can therefore grant probate to them as the executors named in the codicil. By the codicil he revokes a legacy of £150 to his son Robert, and gives him £100, as the latter was indebted to him in the sum of £50, directing the executors not to require payment of the £50. This direction saves their appointment.

1859.

February 23.

In the Goods of FRANCIS KEENE (deceased), on Motion.

*Limited Administration.—Probate.—20 & 21 Vict. c. 77,
s. 73.—Deeds.—Practice.*

In the Goods of
FRANCIS
KEENE.

It is not sufficient, in order to make out the title to a term of years, etc., with the view of obtaining administration, to refer to deeds, deducing such title in affidavits; the deeds themselves must be brought into the Registry.

By indenture bearing date the 27th day of January, 1817, after reciting that Thomas Burge, or George Bennett in trust for him, then stood seised of a certain estate in fee-simple, the said George Bennett and Thomas Burge demised a certain parcel of land therein comprised to Francis Keene, his executors and administrators, to hold the same for the term of 1000 years, at a peppercorn rent, in trust, after the respective deceases of Thomas Burge and Sarah his then present wife, for such persons as William Burge, the son of Thomas Burge, should by any deed or deeds executed by him, or by his last will and testament appoint, and in default of such appointment, in trust for the executors or administrators of William Burge.

By indenture dated the 9th day of September, 1819, made between Francis Keene, of the first part, Sarah Burge, the widow of Thomas Burge, then deceased, of the second part, William Burge, of the third part, and William Foord, of the fourth part, for the consideration of £100 paid by William Foord to Sarah Burge and William Burge, the said premises described in the former indenture were mortgaged to William Foord, subject to redemption on payment to the said William Foord of £100, and interest as therein mentioned; and William Burge, pursuant to the power reserved to him, appointed the said premises after the decease of Sarah Burge to remain in Francis Keene, his executors and administrators, during the remainder of the said term of 1000 years, upon trust for William Foord, until payment of the said sum of £100 and interest, and subject thereto upon trust for William Burge, his executors, administrators, and assigns, for the remainder of the said term.

1859. The said mortgage security was afterwards assigned by William Foord to John Suy, to whom the principal and interest secured by such mortgage were paid off in December, 1825.

February 23. In the Goods of FRANCIS KEENE.

William Burge died on the 29th of April, 1820, intestate, and letters of administration of his effects were granted by the Episcopal Court of Wells in October, 1820, to Elizabeth Burge, his widow. She afterwards married Robert Edney, and died leaving him her surviving. William Burge left two sons, George Burge and Sylvester Burge, his only children, who, together with his widow, were the only persons entitled in distribution to his personal estate and effects.

In 1832, George Burge and Sylvester Burge, by two separate instruments, released all their right and interest in the said premises and other the personal estate and effects of the said William Burge, deceased, to Robert Edney and Elizabeth his wife, whereby, and by virtue of his marriage with the widow of William Burge, Robert Edney became the sole person entitled to the said premises for the remainder of the term of 1000 years.

Robert Edney died on the 21st of November, 1858, having made his will, whereof he appointed George Burge and Robert Edney executors, who duly proved it in the District Court of Wells in December, 1858. Under the trusts of the will, the two executors had sold the said premises for the remainder of the term, but were unable to make a legal title thereto for want of a personal representative of Francis Keene in this country.

Francis Keene died in the United States in April, 1852, leaving a will dated the 14th of August, 1849, whereof he appointed his son Francis Keene sole executor, who was then, and still is residing in the United States, and who was not likely to return to England. The said will of Francis Keene was not likely to be proved in England, and the parties interested were desirous of having letters of administration of the personal estate and effects of the said Francis Keene, limited to his interest in the said premises and the remainder of the said term, granted to George Burge, as one of the executors of Robert Edney deceased.

Affidavits of George Burge and Robert Edney were relied upon in proof of these facts.

Dr. Wambey moved the Court to decree letters of administration of the goods of Francis Keene, deceased, to be granted to George Burge, as one of the executors of the will of the said Robert Edney, deceased, limited to the remainder of the said term of 1000 years in the premises above mentioned. The Court had power under the sect. 73 of 20 & 21 Vict. c. 77, to make such a grant.

1859.

February 23.

In the Goods of
FRANCIS
KEENE.

SIR C. CRESSWELL: The deeds referred to in the affidavits, for the purpose of showing the deduction of the title to the term, must first be brought into the Registry. I cannot act on affidavits that A assigned to B, C, D, etc.

The executor of Francis Keene, the trustee who proved his will in the United States, must also be cited.

Motion to stand over.

In the Goods of HARRIET COOKE.

February 23.

Administration.—Practice under 20 & 15 Vict. c. 77, s. 73.

In the Goods of
HARRIET
COOKE.

Administration will not be granted under sect. 73 of 20 & 21 Vict. c. 77, to a person not by law entitled to the grant, when the person who is entitled to it is resident abroad, and has not received notice of the application, unless the Court is satisfied that it is necessary and convenient that the grant should be made. A general statement upon affidavit that "it is necessary for the preservation of the personal estate and effects of the deceased that administration should be granted," will not satisfy the Court, in the absence of such notice.

Harriet Cooke, a widow, died at Barrackpore, on the 5th of December, 1857, leaving a will bearing date the 4th of November, 1854, whereof she appointed her brother-in-law, John Francis Griffith Cooke, sole executor and residuary legatee in trust, and wherein she also named her children residuary legatees. She left four children her surviving, viz. Frances Harriet Harris (wife of Philip Harris), Bryan William Darwin Cooke, Mary Jane Durell Cooke, and Charles Edward Cooke.

The executor duly renounced his right to the probate of the will and also to the letters of administration with the said will annexed. Two of the deceased's children, Mary Jane Durell

1859. February 23. In the Goods of
HARRIET
COOKE. Cooke and Charles Edward Cooke, who were in this country, being minors, had elected their maternal uncle W. T. Scott to be their guardian, for the purpose of taking administration (with the said will annexed) for their use and benefit. Frances Harriet Harris, one other of the deceased's children, having attained the age of twenty-one, would be entitled, as one of the residuary legatees named in the will, to have letters of administration (with the said will annexed) granted to her; but she was then resident at Canton in China, and was not likely soon to return to this country, in which she had no agent.

The fourth child, Bryan William Darwin Cooke, was then also resident abroad, at Diamond Harbour, in New Zealand, and was still a minor.

An affidavit of these facts was made by the uncle William Treuren Scott, which thus concluded:—"It is necessary, for the preservation of the personal estate and effects of the said testatrix, that letters of administration (with the said will annexed) shall be granted." A proxy of renunciation by the executor, and proxies of election of William Treuren Scott as their guardian by the two minors resident in England, were also filed.

Dr. Wambey now moved the Court, under the 73rd section of 20 & 21 Vict. c. 77, to grant administration (with the said will annexed) of the personal estate and effects of the said Harriet Cooke, widow, deceased, to William Treuren Scott.

SIR C. CRESSWELL: The affidavits do not explain anything, or mention any circumstances to justify the grant. Application should have been made to Mrs. Harris for her consent to this motion, which might easily have been done. A case of pressing necessity should be made out, if I am to use the extraordinary powers given by the 73rd section. As Mr. Cooke is not willing to take probate, I might unquestionably have made the grant, if I had been satisfied that it was, according to the words of the section, "necessary or convenient." You ought to have shown that there is a necessity, in order to bar one of the deceased's children of her rights; and the very general words at the end of Mr. Scott's affidavit do not satisfy me of the necessity.

Motion rejected.

(Before SIR C. CRESSWELL and a Special Jury.)

TODD AND PRICE v. SUMPSION AND SPRIGGES.

Will.—Pleading.—Amendment at Trial.—Costs.—Practice.

1859.

January 21.

TODD & PRICE
v.
SUMPSION
AND
SPRIGGES.

The inclination of the Court is to allow the record to be amended at the trial by the addition of a new plea, rather than to shut out any defence which might be raised. The defendants were allowed to put on the record at the trial a plea, that the will in dispute had been obtained by the undue influence of one of the plaintiffs, subject to the postponement and rehearing of the cause, if required by the plaintiffs, and to the payment by the defendants of all expenses incurred by such postponement.

This was a cause of proving in solemn form the last will of Benjamin Tratt, deceased, promoted by Sarah Todd and Thomas Price, the executors named therein. The will was propounded by the plaintiffs, who alleged in their declaration that the deceased made his last will and testament, bearing date the 27th of January, 1858, and in the said will appointed the plaintiffs executrix and executors thereof; that the said will was duly executed by the testator, and that the testator was, at the time of its execution, of perfect sound mind, memory, and understanding. The defendants in their plea alleged, *first*, that the paper writing bearing date the 27th day of January, 1858, and alleged by the plaintiffs to be the last will and testament of the deceased, was not made by him, and was not the will or testament of the deceased as alleged; *secondly*, that the will was not duly executed by the deceased according to the provisions of 1 Vict. c. 26; and, *thirdly*, that the deceased at the time the alleged will bore date was not of sound mind, memory, and understanding. Upon these pleas the plaintiffs took issue.

Serjeant Pigott and *Dr. Deane*, Q.C. were Counsel for the plaintiffs.

Mr. M. Chambers, Q.C., *Dr. Phillimore*, Q.C., and *Mr. Thompson Chitty*, for the defendants.

Mr. M. Chambers offered evidence to show that the deceased made the will under the dictation of Todd the plaintiff.

1859. SIR C. CRESSWELL: You have placed no plea on the record
January 21. of the will having been made under the undue influence (of
 Todd); the evidence you propose to give is inadmissible.
TODD & PRICE
v.
SUMPTION
AND
SPRIGGS *Mr. M. Chambers*: Evidence of gradual submission to dic-
 tation would tend to show weakened capacity, and would be
 admissible under the third plea.

SIR C. CRESSWELL: I shall tell the jury, that if they are of opinion that the testator had competent understanding when he executed the will, however he may have been dictated to by others, they should find for the plaintiffs.

Mr. M. Chambers: The defendants in their first plea allege that the will was not the will of the deceased. If the will was made under Todd's dictation it was not the act of the deceased. He submitted that the evidence was admissible in support of the first plea.

SIR C. CRESSWELL ruled that the evidence was not admissible under the first plea.

Mr. M. Chambers asked for leave for the defendants to amend their pleas by putting on the record a fourth plea; viz. that the making of the said will was procured by the undue influence of Todd (the plaintiff) and others acting with her.

SIR C. CRESSWELL: I am disposed to allow the amendment; I am inclined to take any course rather than one which might preclude the defendants from raising every possible defence. But if I allow this plea to be put on the record, I shall only do so subject, if required by the plaintiffs, to a postponement and rehearing of the cause; and I will then discharge the jury, so as to give the plaintiffs time to prepare a defence against the new plea; and for this indulgence asked on their part the defendants must pay all the expenses incurred by the postponement of the trial.

Counsel for the plaintiffs ultimately consented to allow the

new plea to be put on the record without requiring the trial to be postponed.

The jury found a verdict for the plaintiffs on all the issues.

BRAINE v. BRAINE AND BRAINE.

1858.

Dec. 1 & 10.

Taxation of Costs.—20 & 21 Vict. c. 77, s. 29.—*Number of Counsel allowed.*—*Discretion of Registrar.*—*Costs of Application.*—*Practice.*

—
BRAINE
v.
BRAINE AND
BRAINE.

In taxing a bill of costs, the Registrar is not bound by the practice of the Prerogative Court as to the number of counsel to be allowed, but should exercise his own discretion in the matter. In making an allowance for briefs, he should consider whether they have been made unnecessarily long and expensive. The question brought before the Court on this application having been raised by the Registrar, costs of the application were not allowed against the plaintiff.

This was a question as to the revision of taxation of costs in the above suit, relating to the validity of the will of George Henry Braine, deceased, which was tried on the 4th and 5th of July, 1858. The question was argued on an act on petition, commenced by the proctor for the defendants.

In the petition the proctor for the defendants alleged, that the suit was instituted by the plaintiff against the defendants, who were the executors named in the said will, for the purpose of trying the validity of the said will; that the issues raised by the plaintiff were that the said will was not executed in pursuance of the provisions of 1 Vict. c. 26, and that the deceased at the time of its execution was not of sound mind; that the cause was tried before the judge of the Court of Probate and a special jury, when a verdict was found for the defendants; that the plaintiff was condemned in the costs of the said suit, and that his Lordship certified that it was a fit and proper one to be tried by a special jury; that the defendants' bill for costs in the said suit was afterwards submitted for taxation to Edward Francis Jenner, Esq., one of the Registrars of the Court; that the said Registrar disallowed divers items of the said bill, and certified the amount of the

1858. said bill as taxed at the sum of £375. 15s. only. On the part
Dec. 1 & 10. of the defendants the certificate of the Registrar was ob-
jected to on the ground that he had disallowed certain charges,
fees, and disbursements particularly set forth in the sche-
dule annexed, being the expenses consequent upon and in-
cidental to the retaining and employing one of the counsel
retained and employed in the said trial on behalf of the de-
fendants, and had also disallowed two of the three consul-
tations held with counsel previous to and during the said
trial; and that by reason of the magnitude of the interests in-
volved in the result of the said trial and that the issue raised by
the plaintiff as to the deceased's incapacity rendered it neces-
sary for the defendants to produce a large number of witnesses,
of whom sixteen were actually examined upon the said trial;
and by reason that the solicitor of the plaintiff gave notice to
the defendants to produce at the trial numerous and voluminous
account-books kept by the deceased, it was deemed necessary
to retain and employ three counsel to conduct the trial, and
also to have three several consultations with counsel there-
upon; and the petition concluded by praying that the certifi-
cate should be referred back to the said Registrar for amend-
ment and to direct that the fees, charges, and disbursements
set forth in the annexed schedule be allowed as costs against
the plaintiff, and to make such other order as might to his
Lordship seem meet.

—
BRAINE
v.
BRAINE AND
BRAINE.

The plaintiff in his answer alleged, that admitting it was
necessary for the defendants at the trial to produce a large
number of witnesses, of whom sixteen were examined, and that
the plaintiff had given notice to the defendants to produce
at the trial the account-books referred to, nevertheless the
said Registrar properly disallowed the said fees, charges, and
disbursements in the petition referred to, and in so doing
exercised a proper discretion and acted according to the prac-
tice of the Court, and prayed that the certificate might not be
referred back to the Registrar.

The Registrar made the following report to the learned
Judge on the subject:—In taxing the bill of costs on behalf
of the defendants, the Registrar has, in the absence of any
rule, experienced considerable difficulty as to the principles on
which he ought to proceed, viz. whether on those adopted in

cases at common law, or on those of the late Prerogative Court of Canterbury. The 29th sect. of the Court of Probate Act, 1857, enacts that the practice of the Court of Probate shall, except where otherwise provided by that act or by the rules and orders, be, so far as the circumstances of the case will admit, according to the practice of the Prerogative Court. The Registrar has therefore endeavoured to steer a middle course, viz. to adopt the principles of the common law courts where applicable to the case, and in other instances, where he has found it possible so to do, he has followed the practice of the Prerogative Court. For instance, in the Prerogative Court, it has not been the practice to allow a third counsel, nor when costs are taxed (as in this case) between party and party to allow consultations with counsel. In this case, however, the registrar considered that as the witnesses were examined *viva voce*, a proceeding until very recently unknown in the Prerogative Court, one consultation previous to the hearing should be allowed—and he has accordingly allowed one. As to the disallowance of the third counsel, the Registrar has not, for the reasons above stated, felt himself at liberty to allow more than two, but he understood that at common law, if more than ten witnesses were called and examined, a third counsel is allowed. In the present case, sixteen witnesses were examined on behalf of the defendants, and if the Registrar had felt himself at liberty to exercise his own discretion, he would have allowed a third. The Registrar understood that at common law it is not necessary for the defendants to have a *junior* counsel, a barrister of the outer bar; he has therefore allowed the fees paid to two Queen's Counsel, instead of one Queen's Counsel and one junior.

1858.
Dec. 1 & 10.
—
BRAINE
v.
BRAINE AND
BRAINE.

EDWARD F. JENNER,

November 19, 1858.

Registrar.

Mr. Manisty, Q.C. (Dr. Spinks with him), for the defendants, submitted that there was no rule in the superior Courts of Common Law, or in the Court of Probate, to preclude the Registrar from allowing, in the exercise of his discretion, fees for three counsel in taxing a bill of costs. The present case was a proper one (and such was the opinion of the Registrar) to allow the charges for retaining and employing three coun-

1858. sel. There were twenty-seven witnesses subpoenaed, and sixteen examined on the part of the defendants.
Dec. 1 & 10.

—
BRAINE
v.
BRAINE AND
BRAINE.

The Registrar, however, did not exercise his discretion in the matter, considering himself bound by the practice of the Prerogative Court. The rule of the Prerogative Court on this matter might be applicable to the mode of conducting suits in that Court, where the evidence was taken before an examiner, and the witnesses were not subjected to an examination or cross-examination by counsel; but the practice as to the conduct of suits in the Court of Probate being assimilated to that of the Courts of Common Law, the practice as to costs should also be assimilated to it.

If the case had been tried in a Court of Common Law, three counsel would have been allowed. In the case of *Sharp v. Ashby*, 12 Mee. & W. 732, which was an action on a bill of exchange, in which the defendant pleaded several pleas, and served a notice on the plaintiff to produce proceedings in Chancery, the plaintiff in consequence went to trial prepared with many witnesses and much documentary evidence, but at the trial he closed his case after the examination of two witnesses; the Master allowed the plaintiff the costs of two briefs only, considering himself bound by a supposed general rule not to allow costs for more than two counsel, except in cases where ten witnesses at least were examined on the trial.

The Court directed the Master to review his taxation and said, "The Master must exercise his discretion as to these costs. No doubt the number of witnesses must form a material ingredient in his consideration, and indeed the principal one; because it certainly is in the examination of witnesses that a division of the labour amongst counsel is most likely to occur; but he is not bound by any such general rule as has been supposed. It is easy to suppose a very trivial case with a great number of witnesses and a very difficult and heavy one with but few. The Master will reconsider the matter and take all the circumstances into his consideration." See also *May v. Tarn and Others*, 12 M. & W. 730; *Morris v. Hunt*, 1 Chitty's Reports, 550. In this latter case one of the objections to the Master's allocatur being, that he had allowed three counsel, Mr. Justice Bayley says, "With respect to the number of counsel, it appears that

“ the Master has allowed three, and it seems to me, that the
 “ Master ought in these cases to exercise a discretion ; which
 “ discretion must be regulated to a certain degree by the na-
 “ ture and magnitude of the cause and number of witnesses
 “ which are likely to be examined. It is fit in cases of diffi-
 “ culty, in which points of law may arise, that the leading
 “ counsel should have the assistance of other gentlemen to
 “ suggest what may be necessary in the course of discussion.
 “ In cases of that description the allowance of counsel should
 “ not be regulated in the same manner as in a common action
 “ for goods sold and delivered, or in any ordinary case in
 “ which no difficulty is likely to arise.” See also *Steward v.*
Steele, 4 C. B. 460.

1858.
 Dec. 1 & 10.
 BRAINE
 v.
 BRAINE AND
 BRAINE.

The 29th section of the Probate Act (1857) would be relied on for the plaintiff, but it did not apply to the circumstances of this case.

Hon. G. Denman, for plaintiff, contended that the Registrar was bound to follow the practice of the Prerogative Court in taxing costs.
Cur. adv. vult.

SIR C. CRESSWELL: In this case an application was made to review the taxation of costs. The Registrar favoured me with his opinion on the subject, which I read in Court the other day, when the case was under discussion, and it appeared that with reference to the allowance of the counsel he had not exercised a discretion, thinking it better to apply to the Court, before he departed from the practice which had obtained in the Prerogative Court. And if that practice had been applicable to the present state of things, the Court would have been bound to abide by it, but I think it was very well put by Mr. Manisty, and I agree with him in thinking, that the rule as to allowing two counsel *only* is not applicable to this Court. December 10.

The course of proceeding in the Prerogative Court was so different, that I think the practice in reference to the number of counsel to be allowed is inapplicable, and that the Registrar is not bound by it. I think therefore he must exercise his discretion as to the number of counsel to be allowed. In doing that he will consider the number of the witnesses exa-

1858. mined, or whose examinations were reasonably introduced into
December 10. the briefs.

BRAINE
v.
BRAINE AND
BRAINE. In making the allowance for briefs, he will of course consider, whether they have been fairly and *bonâ fide* prepared or whether there is any reason to suppose that they have been made unnecessarily long and expensive.

With these directions the matter will be referred back to the Registrar.

Dr. Spinks : Will your Lordship allow the costs of this application?

SIR C. CRESSWELL : No, I think not upon a question raised by the Registrar.

1859. EDWARDS v. PAYNE AND REEVE.
March 9. *Will.—Verdict and Costs for Defendants.—Taxation thereof.*
EDWARDS —Practice.
v.
PAYNE AND
REEVE. A. propounded a will of April, 1858, and was opposed by B. and C., executors of a will of April, 1847. Verdict for the defendants, and A. condemned in the costs. B. and C. objected to the Registrar's taxation of costs, disallowing, first, sixteen witnesses out of twenty-seven who were not examined by the defendants' counsel, though their evidence was briefed and they were in Court; secondly, two witnesses out of the eleven examined as immaterial to the issue; thirdly, the third counsel and brief; fourthly, consultation at end of plaintiff's case. The Court confirming the Registrar's taxation, except as to the second point,

HELD, that the fact referred to in the second objection, which the two witnesses were called to prove, was material to the issue, but that, as it was not a fact controverted in the case, it would have been sufficiently proved by one witness, and the costs of one were allowed accordingly. That the Court will not interfere with the Registrar's discretion as to the number of counsel to be allowed, and that more than one consultation in the progress of a cause is never allowed.

This was a question as to the revision of taxation of costs in the above suit relating to the will of Alice Corri, who died on the 21st of August, 1858, aged seventy-eight years. The plaintiff propounded a will purporting to have been executed

on the 22nd of April, 1858, of which he was sole legatee and acting executor, the other executors named having renounced. The defendants were the executors of a will executed by the deceased on the 10th of April, 1847.

The case was tried before a special jury on the 5th and 6th of January. At the end of the plaintiff's case on the first day, the counsel for defendants determined on consultation to examine eleven only out of the twenty-seven witnesses whose evidence had been briefed on behalf of the defendants. The jury found a verdict for the defendants, and the Court condemned the plaintiff in the defendants' costs, which were taxed in due course. The present application was on behalf of the defendants for a revision of the taxation of their costs, too much, according to their view, having been disallowed.

1859.

March 9.

EDWARDS

v.

PAYNE AND
REEVE.

Mr. Francis moved for a rule *nisi* on the plaintiff to show cause why the taxation of the defendants' costs should not be referred back to the Registrar for review, on the following grounds:—First, the Registrar had disallowed sixteen witnesses on the ground that they had not been examined, as it is understood, though they were sworn to have been material and necessary witnesses. Secondly, out of the eleven examined the Registrar had disallowed two—*Mr. Bailey* the solicitor and *Rodwell* his clerk—who were called to prove the execution of the will of 1847, on the ground that their evidence was irrelevant to the issue before the jury. Thirdly, the Registrar had disallowed the third counsel and his brief; and Fourthly, the consultation which took place at the close of the plaintiff's case, though the result of that consultation was materially to abridge the proceedings on the next day.

March 2.

BY THE COURT: I shall not interfere with the discretion of the Registrar as to the third counsel; on the other points you may take a rule to show cause.

Dr. Addams, Q.C., showed cause against the rule. As to the first objection, the defendants' proctor was challenged at the taxation to point out in his counsel's brief any evidence that the witnesses not called could give other than a reiteration of the evidence of the nine witnesses examined, but he

March 9.

1859.

March 9.

EDWARDS

v.

PAYNE AND
REEVE.

failed to do so. The Registrar was therefore right in disallowing their cost. He submitted also that on the other points objected to, the Registrar's decision ought not to be overruled.

Mr. Francis, in support of the rule. As to the first objection, the Registrar should have made further inquiry before he disallowed the sixteen witnesses not examined. Many of them might have been able to speak to some fact of importance in confirmation or independent of the evidence given by those examined. The cause might in the progress of the trial have assumed such an aspect as to incline the jury to determine it on the weight of the evidence. In this case the additional number of witnesses would have gone towards making up the weight of the evidence. This should have been taken into consideration by the Registrar; it was his duty to have examined the whole case for himself, but this he did not do. As to the second objection, the proof of the execution of the former will was material to the issue. As to the third, the case was a proper one for the Registrar to have allowed three counsel; and as to the last objection, the result of the consultation was materially to abridge the length of the trial, and save expense to the plaintiff.

SIR C. CRESSWELL: As regards the first point, I am of opinion that the Registrar has done his duty in the exercise of his discretion as to the number of witnesses allowed on taxation. Nine witnesses were examined to prove the incompetency of the testatrix. The Registrar probably thought nine witnesses about enough. He was told that the sixteen others were in Court, and that the party expected them to be allowed. He said, "Show me any different facts which the other sixteen were to have proved;" in his opinion the defendants' proctor failed to do so, and I cannot think that the Registrar was bound to read all the briefed evidence, especially when the party who had prepared it could not point out any further facts which the evidence of these witnesses was required to prove. I cannot impugn the Registrar's discretion, especially as he is borne out by the defendants' own counsel who thought it unnecessary to examine them. On the second point, though it is true there was no issue raised as to the *fac-*

turn of the former will, yet it was material to the issue to show that a former will of a different tenor had been executed; but, as it was not a fact in controversy, one witness would have been sufficient to prove it, and one only will be allowed. Thirdly, as I said before, the question of number of counsel is altogether in the discretion of the Registrar; but indeed it was admitted by counsel that if the objection on the first point failed, this almost necessarily follows. Fourthly, in disallowing the consultation, the Registrar was guided by the usual rule, never to allow more than one consultation in the progress of a case.

1859.
March 9.
—
EDWARDS
v.
PAYNE AND
REEVE.

FYSON AND OTHERS v. WESTROPE AND CUTTING.

Jan. 17 & 24.

Will.—Heir-at-Law cited.—Plaintiffs and Defendants.—Costs.
—20 & 21 *Vict. c. 77, ss. 29, 61, 64, 65.*

FYSON
AND OTHERS
v.
WESTROPE
AND
CUTTING.

A., B., and C., executors, propounded a will and two codicils. D., an executor under the will, opposed the second codicil, pleading undue influence and fraud, and that the testator was ignorant of the contents. E., the testator's heiress-at-law, being cited to see proceedings, entered an appearance. By an order made in chambers at the instance of the executors, she was required to plead or to be barred from ever disputing the will, and thereupon pleaded unsoundness of mind and undue influence as regarded the will and first codicil, as well as to the second codicil. The jury found a verdict for the plaintiffs on all the issues, and the Court condemned the defendants, generally, in the costs. On motion, on behalf of the heiress-at-law, to review the decree as to costs:

Held, that the position of an heir-at-law, cited under the 61st section of the Probate Act, is similar to that of the next of kin when cited to see proceedings in the Prerogative Court, and that E. having placed the above pleas on the record, and having totally failed in proof of them, was liable to costs. That as between the defendants, each party was liable to that part of the costs which belonged to his own case. That where costs had been incurred in any matter equally applicable to both parties, so that the Court could not assign them more to one than the other, such portion of costs was to be taxed equally between them.

This was a question of costs, arising out of a suit, which was promoted by Fyson, Hustwick, and Frost, the executors named in the will and two codicils, dated respectively

1858. the 17th of January, 1857, the 23rd of May, 1857, and the
 Jan. 17 & 24. 4th of August, 1857, of Eyre Coote, deceased. Westrope, an
 executor under the will, prayed to be joined in the probate of
 the will and first codicil; but he opposed probate of the second
 codicil, on the ground that its execution was procured,
 first, by the fraud of Fyson and Hustwick; secondly, by
 means of their undue influence and control; and thirdly, that
 the deceased, when he executed it, was ignorant of its contents
 and purport. Cutting, as husband of the heiress-at-law, was
 cited to see proceedings under 20 & 21 Vict. c. 77, s. 61, whereupon
 he entered a *caveat*, on behalf of his wife, against the will and
 first codicil; and upon the *caveat* being warned on behalf of the
 plaintiffs, he entered an appearance, without taking any further
 steps, until he was summoned by the plaintiffs before the Judge
 in chambers, when an order was made for him to plead, if he
 intended to take part in the contest respecting the validity of
 the will and codicils of the deceased. He then filed pleas, denying
 the validity of the will and of both the codicils, on the ground,
 first, that the testator at the time of their execution was of
 unsound mind; and secondly, that they were procured by undue
 influence.

The cause came on for trial in the Court of Probate before
 a special jury; the defendants appeared by separate counsel;
 the verdict was in favour of the plaintiffs, and Sir C. Cresswell
 decreed probate of the will and two codicils; and, considering
 that there was a total failure in showing any reasonable ground
 for disputing the will or either codicil, condemned the defendants,
 generally, in the costs.

January 17. *Dr. Twiss*, Q.C., for the heir-at-law, prayed the Court
 to restrict the decree as to costs to Westrope, or to make such
 other order as that the heiress-at-law should not have to pay
 the costs incurred before she took part in the suit. He contended,
 first, that an heir-at-law, when cited to see proceedings in the
 Court of Probate, should be placed in the same position with regard
 to costs as he would be in Chancery, when cited to see proceedings
 taken there to establish a devise. That in Chancery he was generally
 entitled to costs, and would have been under the circumstances of
 this case (*Daniel's Chancery Practice*, p. 1032; *Grove v. Young*,
 5 De G. & Sm.

41; *Roberts v. Keslake*, 1 K. & J. 751; *Smith v. Dearmar*, 1 Y. & J. 278); secondly, that if the Court would not adopt the rule of the Court of Chancery, it would at least place him in as favourable a position as the next of kin, when cited to see proceedings, and not condemn him in costs. Next of kin were favourites of the Court of Probate. (*Urquhart v. Fricker*, 3 Add. 56).

1859.
January 17.
FYSON
AND OTHERS
v.
WESTROPE
AND
CUTTING.

Mr. O'Malley, Q.C. (*Mr. Keane* with him), *contrà*, for Westrope.

Dr. Deane, Q.C., *contrà*, for the executors, the plaintiffs.
Cur. adv. vult.

SIR C. CRESSWELL (after mentioning the facts as above stated): I am asked to reconsider the order I made in this cause on the subject of costs. At the trial the jury found a verdict for the plaintiffs on all the issues, and as I thought there were no reasonable grounds for disputing the will or either of the codicils, on being asked to condemn the defendants in costs, I did so in general terms. I am now asked to reconsider my decree with respect to costs in two ways: First, as to whether the heiress-at-law ought to be liable to any costs at all; and, secondly, if I am of opinion that she is, then to consider whether she should be condemned to pay an equal proportion in respect of all the costs. Undoubtedly the original decree was imperfect as to costs; its operation might have been to charge either of the defendants with the whole costs; and I think I am bound to distribute them in certain proportions between the defendants. As regards the liability of the heiress-at-law, Dr. Twiss referred to several passages in Mr. Daniel's valuable treatise on Chancery Practice, to show in what way heirs-at-law are treated in the Court of Chancery when made parties to a suit there depending for establishing the validity of a will of realty; but the statute under which I act (20 & 21 Vict. c. 77, s. 29) directs me (except where otherwise provided by the act or by the rules and orders to be from time to time made under the act), so far as the circumstances of the case admits, to follow the practice of the Prerogative Court; and by the third and fourth rules (1857),

January 24.

1859.
January 24.
—
FYSON
AND OTHERS
v.
WESTROPE
AND
CUTTING.

it is ordered that next of kin and all others who, previous to the passing of the Probate Act, had a right to put executors or others to the proof of a will in solemn form of law, or to intervene in a suit, shall continue to possess the same rights and privileges and be subject to the same liability as to costs as heretofore.

Now the 61st section of the Probate Act enacts, that “where proceedings are taken under this act for proving a will in solemn form, or for revoking the probate of a will on the ground of the invalidity thereof; or where in any other contentious cause or matter under this act the validity of a will is disputed, unless in the several cases aforesaid, the will affects only personal estate, the heir-at-law, devisees, and other persons having or pretending interest in the real estate affected by the will, shall, subject to the provisions of this act, be cited to see proceedings, or otherwise summoned in like manner as the next of kin, or others having or pretending an interest in the personal estate affected by a will, should be cited or summoned, and may be permitted to become parties or intervene for their respective interests in such real estate, subject to such rules and orders and to the discretion of the Court.”

I think the effect of these clauses is to put the heir-at-law so much in the same position as the next of kin, that in deciding the question of costs I ought to apply the same principles in both cases, and consequently the heir-at-law is liable to costs to the same extent as the next of kin was in the Prerogative Court. In this view therefore, parties setting up a will affecting real estate are bound to cite the heir-at-law and bring him into Court; if they have omitted to do so, and take Probate in common form, and afterwards have occasion to use the Probate in a suit with the heir-at-law, he would be at liberty to dispute its validity (s. 64); but then the 65th section leaves it to the discretion of the Court before which in any such action or suit the original will shall be proved and produced, to direct by which of the parties the costs shall be paid; and this confirms the view I take of the position of heir-at-law when cited in this Court. Now that being so, and applying the practice of the Prerogative Court, an heiress-at-law pleading such pleas as she did in this case, is in a position analogous to the next of kin in

the Prerogative Court, who, not content with putting the executor on proof of the will, had actually disputed the will, had brought in an allegation responsive to the case set up by the executors, and had failed in proof of it. By the practice of that Court, such next of kin incurred the risk of being condemned in costs from the time of bringing in such allegation; and so in this case I think the heiress-at-law is liable in the costs incurred since she entered the *caveat* against the will and first codicil. As regards Westrope, I have not the least doubt that he is liable to costs. But they ought to be distributed in certain proportions. I think it will be fair to apply the course of practice adopted in the Common Law Courts, where parties are called upon to plead separately and several issues are raised, and some are found for the plaintiff and some for the defendant, each party is held liable in respect to that part of costs which belongs to his own case. I therefore order that the Registrar shall tax against the heiress-at-law such portion of the briefs and witnesses as belong to the issues raised as to the will and first codicil from the time of the entry of her *caveat* against them;—against Westrope, the costs of such parts as relate to the second codicil; but where costs have been incurred in any matter equally applicable to both parties, so that they cannot be assigned more to one than the other, that portion of costs should be taxed equally between them; Mr. Westrope to pay such costs as preceded the *caveat* entered by the Cuttings. I make no order as to the costs of the present motion.

1859.
January 24.
—
FYSON
AND OTHERS
v.
WESTROPE
'AND
CUTTING.

SWINFEN v. SWINFEN.

March 28 & 30.

Will.—Next of Kin.—Executrix.—Costs.

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SWINFEN
v.
SWINFEN.

A., a party entitled in distribution, and who was also heir-at-law, filed a bill in equity against B., the executrix of a will; and an issue, *devisavit vel non*, was directed to be tried, which ultimately ended in a verdict for the executrix. Immediately after filing the bill, A. cited B. in the Prerogative Court of Canterbury to bring in the probate of the will which had been granted to her in common form. B. propounded the will and examined three witnesses, to whom A. administered unobjectionable interrogatories. The evidence was published on the prayer of A., just before the first trial of the issue at

1859.
March 28 & 30.

SWINFEN
v.
SWINFEN.

common law, and no further step was taken in the cause till the ultimate decision as to the real estate in favour of the executrix, when A. consented to probate being taken by B. On a question as to A.'s costs :

HELD, that though, under the circumstances of the will, A. would have been entitled to his costs out of the estate, if the suit in the Prerogative Court had been brought with the simple object of taking the opinion of that Court on the will, yet that as it appeared that the suit was brought with the view of eliciting facts and evidence to be used at the trial of the issue, A. ought not to be allowed his costs out of the estate.

This was a question of costs, arising out of a suit with respect to the validity of the will of Samuel Swinfen, who died on the 26th of July, 1854, leaving a will executed on the 7th of the same month, by which he left the Swinfen estate of the value of about £2000 per annum, and personalty to about the value of £10,000, to Patience Swinfen, the widow of his son, whom he made his executrix, and he also bequeathed an annuity of £20 to a nurse. On the 14th of November in the same year, probate of this will was granted to the executrix, the personalty being sworn under £16,000 : there was no disposition of the residue in the will. At the time of the testator's death, John Swinfen, his only surviving brother of the whole blood, and his heir-at-law, was in a state of imbecility, and died in April, 1855. There were several brothers and sisters of the half-blood, and Frederick Hay Swinfen, the plaintiff in this suit, and his sister, children of a deceased brother of the half-blood, entitled in distribution to his personal estate. Frederick Hay Swinfen was with his regiment in the Crimea at the time of the testator's death ; he returned to England in March, 1855 ; by his uncle's death in April, 1855, he became heir-at-law, and instituted inquiries as to the circumstances of the execution of the will, which led to the filing of a bill in Chancery on the 12th of July 1855, as to the real estate, and on the 13th of July, a citation issued under the seal of the Prerogative Court of Canterbury, calling upon Mrs. Swinfen to bring in the probate, which was done on the 7th November, 1855 ; an allegation propounding the will on behalf of Mrs. Swinfen was admitted on the 7th January, 1856, and Captain Swinfen's answers on oath brought in on the same day. On the allegation the three attesting witnesses, Charles

Simpson, Charles Swinfen, and Thomas Rowley, a physician, were examined, and interrogatories administered to them on behalf of the plaintiff, who gave in no plea, and on the 1st of February, 1856, publication was decreed at the prayer of Captain Swinfen's proctor, Mrs. Swinfen's proctor praying the Judge to suspend publication till the first session of the following term.

1858.

Mar. 28 & 29.

SWINFEN
v.
SWINFEN.

On the 30th July, 1855, the Court of Chancery directed an issue, *devisavit vel non*, which was tried at Stafford, on the 17th and 19th of March, 1856, and ended in a compromise. The compromise was repudiated by Mrs. Swinfen, and she obtained an order for a new trial, which terminated in a verdict in her favour in July, 1858. On the 8th of January, 1859, a motion for a new trial was dismissed by the Master of the Rolls with costs. On the 1st of March the bill as to the real estate was dismissed without costs, but the costs of the issue tried were directed to be paid by Captain Swinfen. Captain Swinfen now withdrew his opposition to the will in the Court of Probate, and consented to probate being taken by Mrs. Swinfen.

Dr. Spinks, for Mrs. Swinfen, now prayed the Court to decree probate. He did not press the Court to condemn Captain Swinfen in costs, but as it had been intimated that Captain Swinfen intended to ask for his costs out of the estate, he submitted that it was for his counsel to show that he was entitled to them, he having failed in his opposition to the will.

March 28.

THE QUEEN'S ADVOCATE (*Sir J. D. Harding*) and *Dr. Philimore*, Q.C., for Captain Swinfen, submitted that there were sufficient grounds for inquiry into the validity of the will; there had been no delay on the part of Captain Swinfen in commencing the suit; it had not been improperly or vexatiously conducted; and his cross-examination had elicited material facts. They cited *Armstrong v. Huddleston*, 1 Moore, P.C., 478-90; and *Prinsep v. Dyce Sombre*, 10 Moore, P.C. 301; also *Ross v. Chester*, 1 Hagg. 227.

Dr. Spinks, in reply: The fact is, the party proceeding used the suit in the Prerogative Court in the nature of a bill of discovery for the benefit of his suit respecting the real estate as

1859. heir-at-law. This might be inferred from the circumstance of
March 23. his pressing for publication just previous to the trial of the
issue at Stafford in March, 1856. From that time till the
present no step was taken in the cause. He contended that
he was not entitled to have his costs out of the estate.

SWINFEN
v.
SWINFEN.

Cur. adv. vult.

- March 30. SIR C. CRESSWELL, after stating the facts of the case as above, said : It is now arranged by the parties to the suit that the Court of Probate shall pronounce for the will ; the only question that remains is, whether Captain Swinfen is to have his costs out of the estate. The executrix did not press to have him condemned in costs. It was argued for Captain Swinfen, that he, being a party entitled in distribution, had a right to call upon the executrix to prove the will in solemn form ; that the suit had been properly conducted on his part ; that he gave in no allegation, but merely cross-examined the witnesses ; that he had many reasons for viewing the will with suspicion ; and that he had, in his interrogatories put to the witnesses examined for the executrix, elicited important facts concerning it, and that therefore he should have his costs out of the estate. Two cases were relied upon, as going further than the present application : the first was that of *Prinsep and the East India Company v. Dyce Sombre*, 10 Moore, P.C. 232, in which the will and codicil of Mr. Dyce Sombre were propounded in the Prerogative Court by Mr. Prinsep, one of the executors therein named ; and after a severe contest in that Court, judgment was pronounced against their validity on the ground that the deceased was not of sound mind when he executed the same, and Mr. Prinsep and the East India Company were condemned in all the costs occasioned by that suit. From this decree there was an appeal to the Judicial Committee of the Privy Council, where the judgment of the Prerogative Court was affirmed so far as it pronounced against the validity of these instruments, but was varied with respect to costs, giving no costs against the appellants, but allowing them one set of costs out of the estate. At page 302 of 10 Moore, P.C., Dr. Lushington, who delivered their Lordships' judgment, observes :—" After the history which we have given " of this case, is it possible to deny that before the evidence in

“ the case had been produced, there were doubts, and very grave
 “ doubts, as to the testamentary capacity of the deceased at the
 “ period when the will and codicil were made? Men of the
 “ greatest eminence in the medical profession had expressed
 “ the strongest opinions as to his sanity; gentlemen who had
 “ been in the habit of associating with him, persons of judg-
 “ ment and of unimpeachable honour, had declared the same
 “ conviction. . . . Then was there any misconduct on the
 “ part of the appellants which should subject them to the pay-
 “ ment not only of their own costs but of those of their adver-
 “ saries? . . . We have no hesitation therefore in declaring
 “ our opinion, that the judgment, so far as it awards costs
 “ against Prinsep and the East India Company, cannot be
 “ maintained. A much more doubtful question is, whether
 “ we can give them costs out of the estate: very great expense
 “ has been incurred in this case by the course of pleading
 “ adopted by the several parties. There are two distinct par-
 “ ties asserting the validity of these papers; there are three
 “ separate parties opposing them. The case is in many re-
 “ spects very peculiar. Though the commission of lunacy
 “ against the deceased was never superseded, he was treated
 “ under it in a manner in which no other lunatic, in our
 “ experience, ever was treated. He was entrusted with the
 “ whole income of his large property, after making a provision
 “ for his wife; and the circumstances altogether were such as
 “ to make it, in our opinion, essential to the purposes of jus-
 “ tice that the validity of these papers should be submitted to
 “ judicial decision. Upon the whole, therefore, we have de-
 “ cided humbly to advise her Majesty to vary the decree of
 “ the Court below with respect to costs; to give no costs
 “ against the appellants, but to allow them out of the estate
 “ one set of costs only, between Prinsep and the East India
 “ Company, including the costs of this appeal.”

The other case relied upon was *Armstrong v. Huddleston*, 1
 Moore, P.C.491, when Lord Brougham, in delivering judgment,
 said:—“ Now we think that this is a case peculiarly circum-
 “ stanced in many respects. I have adverted to some very
 “ strong features; there are others which are exceedingly
 “ marked, which I have not dealt with; it is not necessary.
 “ It remains to observe that this is a large property; that the

1859.

March 30.

SWINFEN
 v.
 SWINFEN.

1859.
March 30.
—
SWINFEN
v.
SWINFEN.

“ family of the testator had been exceedingly beloved by him ;
“ that a very great change had taken place in his intentions
“ within a very few months ; that at the period of the making
“ of the will his mind was enfeebled by his affections ; his
“ affections prevailed ; not that his judgment was weak, but
“ that his affections were stronger. The result of that was,
“ instead of having a comparatively large fortune left them,
“ the family, whom he had cherished with great affection—
“ an affection mutual between the parties—were left with a
“ legacy only of £1000, and nearly the whole, if not the whole,
“ was left to the widow Mrs. Armstrong. Their Lordships
“ are of opinion that the estate in this case should bear the
“ costs of the whole proceeding, with the exception of that
“ needless part to which I have adverted.” I cannot help
being struck by the language in which that judgment was
given, as if the Court were embarrassed to find reasons for
giving costs out of the estate. In the present case there is no
change of intentions, no disappointment of expectations held
out ; it is simply the case of a party entitled in distribution
calling for proof of the will, and administering unobjection-
able interrogatories ; and if I had thought that the object of
the proceeding in the Prerogative Court had been simply to
take the opinion of that Court upon the will, I should have
considered that the circumstances of the case warranted a de-
cree for costs out of the estate ; but I cannot avoid coming to
the conclusion that these proceedings were not taken for that
purpose alone, but as ancillary to the other suit pending in
respect of the real estate, and in the nature of a bill of disco-
very to get evidence which might be available on the trial of
the issue at common law. I shall make no order as to costs.

March 9.

In the Goods of JANE BELL, on Motion.

In the Goods of
JANE BELL.

*Administration.—Wife's next of Kin.—Renunciation of Hus-
band's personal Representative.—Practice.*

A. died in 1831, being at the time of her death entitled to the reversion
of a share of £200, leaving (B.) her husband and several children by
him her surviving. The husband subsequently married (C.), and died

in 1832 intestate, leaving C. and several children by his two marriages him surviving. D., a creditor, took out administration to his effects. In 1857, A.'s reversion came into possession; D. renounced his right to administer to A.'s estate. On application to the Court to grant administration of it to C. as B.'s relict:

1859.

March 9.

In the Goods of
JANE BELL.

Held, that the children of A., and not C., were entitled to the administration.

Jane Bell, the deceased in this case, died in 1831, in the parish of Heddon, Northumberland, leaving her husband, George Bell, and children by him her surviving. At the time of her death, she was entitled in reversion to one-third part of £200 upon the death of Jane Barker. George Bell remarried, and died in September, 1832, intestate, leaving Elizabeth Bell, now Elizabeth Wallace, his widow, and six children by his first marriage and one by his second marriage him surviving.

In December, 1832, letters of administration of the personal estate and effects of George Bell were granted by the Consistorial Court of Durham to William Stephenson, a creditor of George Bell, the said widow and children having been first cited, but not appearing.

By the decease of the said Jane Barker, in 1857, the reversionary interest of the said Jane Bell in the £200 became due and payable to her estate.

The said William Stevenson having satisfied his own debt out of the estate of George Bell, had renounced his right to the administration of the personal effects of Jane Bell.

Dr. Tristram now moved the Court "to grant letters of administration of the personal estate of Jane Bell to Elizabeth Wallace." Mrs. Wallace, through her former husband took a derivative interest in Jane Bell's one-third share of the £200, amounting to one-third of the property unadministered to; and though George Stevenson, and not Mrs. Wallace, was his personal representative, yet, as he declined to administer to the property, the Court might grant her the administration.

SIR C. CRESSWELL: Mrs. Wallace cannot claim to take out letters of administration to the effects of Jane Bell, as the representative of George Bell. She cannot claim as representing his former wife. If Stephenson, the representative of

1859. George Bell, declines to take out administration, the children of the former wife, as representing her, are entitled to take the grant. They are the proper persons to take out administration, and not Mrs. Wallace.

March 9.
In the Goods of
JANE BELL.

Motion rejected.

February 15
and March 9.

WARREN (by his Guardian, Badnell) v. KELSON.

WARREN v.
KELSON.

Letters of Administration with Will annexed.—Grant de bonis non—Residuary Legatee—Next of Kin.

A. died in 1856, leaving a will on the construction of which, in respect to a question between B. the asserted residuary legatee, and C., the next of kin, the Judge of the Prerogative Court of Canterbury decreed letters of administration with the will annexed to C., the testator's sister and next of kin. A bill was subsequently filed in Chancery for the administration of the estate, in determining which Wood, V.C., held that B. was the beneficial residuary legatee. Afterwards C. died, leaving goods unadministered, and a question arising in the Court of Probate as to the grant *de bonis non* between B. and another next of kin :

Held, without going into the construction of the will, that the suit before Wood, V.C., was substantially an appeal from the decision of the Prerogative Court. Administration *de bonis non* granted to B. in accordance with the decision in Chancery.

This was a question of administration with the will annexed of the unadministered goods of William Hall, who died on the 23rd of October, 1856, leaving a will bearing date the 17th of January, 1853, in his own handwriting, by which he gave all his real and personal estate to William Unsworth and John Atkinson, whom and their executors, administrators, and assigns he appointed executors of his will. W. Unsworth predeceased the testator, and Mr. Atkinson renounced probate. The testator died a widower, without child or parent, leaving him surviving Sarah Rudall, his sister and only next of kin, and several nephews and nieces entitled in distribution.

A question arose as to the right to administration with the will annexed between Sarah Rudall, as next of kin, and Warren,

a minor, by his guardian, claiming as residuary legatee under the following clause:—"I will my freehold house, No. 71, " Queen's Road, Bayswater, to be given to the inhabitants of " Bayswater, to found a lying-in asylum for unmarried women, " and poor married women if there is more than three beds to " spare. I will that there shall be no paid parson, priest, or " chaplain, whose services is not gratis, attend the said asylum. " I will that the same be called Hall's Maternal Asylum for " Unmarried Women. I will that my said executors do call " a meeting of the neighbours and inhabitants of one mile " round the said house, as soon as convenient, to appoint a " committee and trustees to carry out the same. I do ap- " point my godson, William Hall Warren, one of the said trus- " tees, leaving to the inhabitants to make choice of as many " more as they may please; but in the event of the said in- " habitants not appointing a committee, or not willing to carry " out the same scheme, I then will that all my said property " so given to the said maternal retreat, or lying-in asylum, " shall absolutely belong to my godson, William Hall Warren; " and I will that the deeds of the said house be given to my " trustee or trustees; I will that the said trustee or trustees " be my residuary legatees to this my will." The will pro- ceeded to give further legacies, some to the legatees only for life, to revert " to my residuary legatee or legatees for asylum " mentioned." There was no further disposition as to residue. It was agreed that the devise of the freehold was void under the Mortmain Act. The question as to the right to adminis- tration was argued before the late Judge of the Prerogative Court of Canterbury; and on the 4th of June, 1857, Sir John Dodson, being of opinion that the bequest attending the void devise failed, and that the bequest over to Warren would, under the circumstances, be of no effect, decreed administration with the will annexed to Mrs. Rudall as next of kin, and ordered the costs of both parties to be paid out of the estate: *Rudall v. Warren, by his Guardian*, Deane & Swabey, 306. The question of the construction of the will then came before Wood, V. C., and was argued and determined in the course of July, 1858, when the Vice-Chancellor held that the gift over to the godson took effect, and that it extended to all the property devised for the benefit of the charity: *Hall v. Rudall*;

1859.

February 15
and March 9.WARREN
v.
KELSON.

1858.
February 15
and March 9.

WARREN
v.
KELSON.

*Warren v. Hall.*¹ Sarah Rudall, the administratrix, with the will annexed, died on the 14th of September, 1858. A *caveat* was then entered on behalf of Jane Kelson, a niece of the testator; the *caveat* was warned, and an appearance entered for her; and a petition was filed on behalf of William Hall Warren, praying a grant of administration with the will annexed, of the goods unadministered, to be made to Emma Badnell, the guardian lawfully appointed by the High Court of Chancery of the person and estate of W. H. Warren the residuary legatee for his use and benefit and until he should attain the age of twenty-one years. The answer to the petition stated, among other matters, the intention of the next of kin to appeal from the decree of Wood, V. C., and prayed administration to be granted to Jane Kelson, as one of the next of kin.

The case was argued on February 15th by *Dr. Deane*, Q.C., and *Mr. De Gez*, for the asserted residuary legatee.

Dr. Spinks, and *Mr. Osborne*, for the next of kin.

SIR C. CRESSWELL directed the case to stand over, to ascertain whether the parties could agree on an independent person to take the grant. The parties being unable to agree, judgment was subsequently given.

March 15. SIR C. CRESSWELL: This was a petition for letters of administration, with the will of William Hall annexed, of the goods left unadministered by Sarah Rudall deceased, to whom administration, with the will of W. Hall annexed, was granted by the Prerogative Court in 1857. The case for the petitioner was, that the grant of administration having been made to Rudall, a bill was filed in the Court of Chancery for the administration of the estate of the testator, and that Vice-Chancellor Sir W. Page Wood had, by his decree, declared that the petitioner, W. H. Warren, was entitled to his own use to the residuary, real, and personal estate of the testator, including his estate and interest in the freehold and leasehold houses, devised and bequeathed for the purposes of the maternal asylum, in the pleadings mentioned; subject, as to such of

¹ 4 Kay & Johnson, 603.

the said houses as were devised or bequeathed to tenants for life, to their life estates therein respectively. The case on the other side, was, that Sir J. Dodson decided that the petitioner had no beneficial interest in the residue; that he was made residuary legatee solely for the purpose of carrying into effect the scheme for a charity, in favour of which the testator had devised and bequeathed his property; that such devise was void, and the devise over was void also, and therefore he granted administration to Sarah Rudall, next of kin to the testator. As the estate will be administered under the direction of the Court of Chancery, it seemed to me that the contest was about a mere matter of form, and I entertained some hopes that the parties would be able to agree upon some person acceptable to both to whom the grant might be made. In this I have been disappointed, and I must now dispose of the question raised before me. There is no doubt that the opinions of the late Sir J. Dodson and Vice-Chancellor Sir W. Page Wood as to the effect of the will of William Hall are at variance, and I was pressed by the counsel for one party to abide by that which was held by Sir J. Dodson,—whom I am bound to consider in some sort as my predecessor,—and by the counsel for the other party to defer to the very elaborate judgment of Sir W. Page Wood. If it were necessary for me to state which construction of William Hall's will I think correct, I should be prepared to do so; but it seems to me that I am not called upon to do this, and I the more readily avoid it, in consequence of the statement made at the bar, that the parties interested have appealed to the House of Lords, having accidentally omitted to lodge an appeal to the Lord Chancellor in due time. The Court of Probate does not habitually act as a court of construction; that is not its proper function, save in cases where it is absolutely necessary in order to determine the rights of litigant parties. In this case Sir J. Dodson was bound so to act; but having given his opinion, and granted administration to the next of kin, resort was had to the Court of Chancery to obtain the opinion of that Court; and according to the opinion of that Court the estate of the testator must ultimately be administered. I therefore consider that the proceeding in the Court of Chancery is in the nature of an appeal from the judgment of the Prerogative Court, and that

1858.

March 15.

WARREN
v.
KELSON.

1859. I ought to follow the last decision, viz. that of Vice-Chancellor
 March 15. Sir P. Wood. The grant will, therefore, be made as prayed
 by the petitioner.
 WARREN
 v.
 KELSON.

March 23. In the Goods of JAMES MUIR (deceased), on Motion.
 In the Goods of JAMES MUIR. *Probate.—English Domicil.—Personalty in Scotland.—Sect. 14
 of Confirmation and Probate Act, 1858.*

A note or memorandum of the domicil of the deceased cannot, under sect. 14 of the Confirmation and Probate Act, be indorsed on the probate after it has issued. The Court will not revoke a probate which has been rightly granted, and was not taken out under a mistake.

James Muir, the deceased in this case, who was a Scotchman by origin and married in 1838, being then domiciled at Greenock in Scotland, entered into a post-nuptial contract with his wife, Maria Muir, whereby, with certain exceptions, all the property belonging to them at the time of their respective deaths was settled on the husband, the wife, and the survivor of them for their respective lives, and on the death of the survivor on the children of the marriage. The deceased subsequently left Scotland and settled in England, where he acquired, and up to the time of his death retained, an English domicil. In October, 1858, he died at Glasgow, whither he had gone for a temporary purpose, leaving a will which he made in 1857, when he was domiciled in England, whereby he gave the bulk of his personal property to his said wife, Maria Muir, for life, or during her widowhood, with remainder to trustees in trust for his children; and he appointed his said wife sole executrix of his will. Mrs. Muir had in the first instance been advised that the whole of her husband's personal estate had passed under the post-nuptial contract, and that his effects might be properly sworn under £20. She accordingly took out probate in the principal registry of this Court; afterwards, she was advised that, by the law of Scotland, the post-nuptial contract operated only on a portion of the property therein referred to, and that in respect

to the other portion of the property, namely, that which her husband acquired after he became domiciled in England, the will would operate, and that a fresh probate duty would be payable on about £4935, of which about £630 was in England, and the residue in Scotland.

1859.

March 28.

In the Goods of
JAMES MUIR.

Mr. W. F. Robinson moved the Court on behalf of the executrix, to direct that a note or memorandum of the deceased having died domiciled in England, should be made on the probate which had issued, under sect. 14 of 21 & 22 Vict. c. 56.

SIR C. CRESSWELL: Upon the 14th section I had occasion, soon after the Act passed, to bestow a good deal of consideration, and I then came to the conclusion that the note or memorandum should be indorsed upon the probate upon its issuing, and that it could not be done afterwards.

Mr. W. F. Robinson then moved the Court to revoke the probate, in order that a new one might be obtained, in which the English domicil of the testator might be stated, or whereon it might be noted.

SIR C. CRESSWELL: The only ground for this part of your application is, that the probate has been taken out for too little. There is no instance in the registry of what you apply for having ever been done. It is not necessary that you should take this proceeding; I think it better not to introduce a new practice, which may be attended with a good deal of inconvenience. It is better to say that a probate rightly granted, and not taken out under any mistake, cannot be revoked. I must leave you to the old practice.

Motion rejected.

In the Goods of CHARLES GOLDSBOROUGH AND OTHERS
(all deceased), on Motion.

In the Goods of
CHARLES
GOLDS-
BOROUGH
AND OTHERS.

*Administration Bond.—Power of Attorney.—Alteration of
Condition of Bond.—Alteration of Terms of Affidavit.*

When a party entitled to administration is abroad, and has given a

1859.
March 23.
—
In the Goods of
CHARLES
GOLDS-
BOROUGH
AND OTHERS.
- simple power of attorney to his agent in England to take out the administration for his use and benefit, the Court will only grant administration to the agent on the same terms as it would have granted it to the party himself.
The Court, on application, refused to alter the usual conditions of the administration bond and the terms of the ordinary administration oath.

Charles Goldsborough and eleven other persons, all deceased, and who were at the time of their respective deaths resident and domiciled in the United States, were severally entitled for a certain time to a share of the dividends arising from a sum of Bank Stock standing in the name of the Accountant-General of the Court of Chancery in a certain case, which since the year 1811 had been pending in that Court. This cause having at length been brought to a close, it was now requisite to obtain a representation to the different parties who, when alive, were entitled to the accumulated dividends. Mr. Tomlin, the solicitor in the suit in Chancery, by the direction of Vice-Chancellor Kindersley, proceeded in September last to the United States, to make inquiries (amongst other things) as to who were the parties entitled to the accumulated dividends. He then ascertained the parties entitled, and that they were all resident in the United States, and obtained from each of them a power of attorney, duly executed, appointing him, Mr. Tomlin, respectively their attorney, to apply for and obtain letters of administration of the personal estate and effects of the person to whom such power of attorney related, to be granted to him on behalf of the party giving the power. Mr. Tomlin had applied in the registry for a grant of administration, but he objected to enter into administration bonds with sureties, and to make affidavits for the due performance of the office of administrator, in the usual forms, as there required.

In the cases where the deceased had left a will, the condition of the bond was to pay the debts of the deceased, and then the legacies contained in the said will annexed to the letters of administration to be granted, and afterwards to pay the residue to such person or persons as should be by law entitled thereto; and in the cases where the deceased had died intestate, to pay the debts, and then to pay over the residue

to the persons entitled in distribution. He was also required in each case to make an affidavit in conformity with the condition of the bond.

1859.
March 23.

In the Goods of
CHARLES
GOLDS-
BOROUGH
AND OTHERS.

Dr. Spinks, under the special circumstances of the case, applied to the Court "for a special order, under the 81st section of the Probate Act, that the condition of the bond, instead of being in the usual form, should be for Mr. Tomlin, after collecting and converting the effects, etc., to pay the same to the person for whose use and benefit the letters of administration to the goods, chattels, and credits of the deceased had been granted to Mr. Tomlin; and also that the terms of the affidavit should be so altered as to conform with the condition of the bond as altered." Many of the persons originally entitled had been dead for several years, and it would be extremely difficult, if not impossible, for Mr. Tomlin to ascertain if all their debts had been paid, or, where they had left wills, if all the legacies bequeathed had been discharged; it would also be very difficult for him to undertake the distribution of the residue, which would be governed by the discordant laws of the States in which each of parties deceased happened to have been domiciled at the time of his death. Mr. Tomlin objected to the bond being kept hanging over his head for an indefinite number of years.

SIR C. CRESSWELL: Where a person is authorized by a simple power of attorney to take out administration, the Court ought to decree to him such administration as it would have granted to the person who conferred the power, if he had applied for it himself. If I decree administration to Mr. Tomlin, in pursuance of the power, the grant must follow the terms of the power. The power is for a general grant; I cannot, therefore, make a special grant. Mr. Tomlin must also take the usual administrator's oath, which will follow the terms of the conditions of the bond. If this course is, in any case, objected to, the party entitled can take out administration, and send a power of attorney to some one in this country authorizing him to act for him.

Application rejected.

1859.

March 5 & 23.

SOUTHALL AND HUXLEY v. JONES.

SOUTHALL AND
HUXLEY
v.
JONES.*Power of Appointment under Settlement.—De facto Marriage with deceased's Wife's Sister.—Will.*

In contemplation of a marriage between A. and B., certain personal property of B.'s, the intended wife, was placed in the hands of trustees to hold in trust for her till marriage; then in trust for A. and B. during their respective lives, and then for the children of the marriage; and if there were no issue, and in case B. should die in the lifetime of A., in trust for such persons as B. should by will appoint. A marriage *de facto* took place between A. and B. in July, 1842; but such marriage was void in law, B. being the sister of A.'s deceased wife. In October, 1842, B. made a will (confirming the settlement) purporting to be made under the power therein contained, and by all other powers, etc., and left various legacies to be paid six months after the death of A., and thereby also disposed of the residue of the trust-properties. A. died in December, 1846; after which part of the trust-estate, consisting of money in the funds, was transferred to B.'s name, and securities in which other parts were invested were handed over to her; and she, with her solicitor's consent, destroyed the marriage-settlement. B. died in January, 1857. The will was found a few days after her death among some title-deeds of property which had belonged to A.; but under advice of counsel as to the invalidity of the will, C., her sister and next of kin, took out letters of administration to B. as dead intestate. The executors named in the will called in these letters of administration, and propounded the will.

Held, that the will was valid under B.'s general power of testamentary disposition, though she might have made it thinking it might operate under the settlement; her intention to benefit the legatees being clear, though she had certainly intended A. to take a life-interest in the property. Probate granted, and the costs of the defendant ordered to be paid out of the estate.

This was a question as to the validity of the will of Catherine Crane (otherwise Wood), purporting to be made under a power contained in a deed of settlement, executed in contemplation of the marriage of Catherine Wood and Benjamin Crane, the widower of her deceased sister, which marriage *de facto* took place in July, 1842. In October of the same year, Catherine Crane made a will purporting to be made under the power contained in this settlement, and by all other powers to her belonging, whereby she confirmed the said settlement, and left various legacies to be paid six months after

the death of Benjamin Crane, and disposed of the residue of the trust property. Benjamin Crane died in 1846, after which part of the trust estate, consisting of money in the funds, was transferred to the name of Catherine Crane, and securities upon which other parts were invested were handed over to her, and she, with the consent of the solicitor, destroyed the marriage settlement. As no facts were in dispute, the case was argued and determined on affidavits; the facts as to the transfer of the stock and securities to the testatrix after Benjamin Crane's death, and the destruction of the marriage settlement, appeared by the affidavit of the solicitor, who was a party to the settlement and drew the will. From the affidavit of Ann Jones the defendant, it appeared that the deceased, her sister, died at her house, in January, 1857, after a few days' illness; that, in answer to a question put to the deceased by the deponent's late husband, "whether she had made her will?" the deceased replied, "Ann (meaning Mrs. Jones) is heir to all I have."

1859.
March 5 & 23.
SOUTHALL AND
HUXLEY
v.
JONES.

The will was found amongst some title-deeds of the deceased's property a few days after her death, but her sister the defendant, being advised by counsel that it was invalid, took out letters of administration to the deceased, as dead intestate.

The executors named in the will had since called in those letters of administration and propounded the will. The remaining facts appear sufficiently in the judgment.

Mr. Shapter, Q.C., and *Dr. Addams*, Q.C., for the executors, contended that the marriage between Catherine Wood (the testatrix) and Benjamin Crane was invalid; that the trustees consequently held the property assigned to them by the instrument dated July, 1842, in trust for the testatrix; that she had, at the date of the will, the *jus disponendi* of this property by will, and that the will in question was a valid disposition of it, although there was a reference therein made to the power; for that the testatrix had not only referred to the power in the settlement, but also all other powers enabling her to dispose of the property; and cited *Robinson v. Dickinson*, 3 Russell, 339; *Dobbins v. Bowman*, 3 Atk. 408; *Habergham v. Vincent*, 2 Ves. Jun. 204; and *Burton v. Collingwood*, 4 Hagg. 176.

1859. *Dr. Deane*, Q.C., for the next of kin, admitted that the marriage between Catharine Wood and Benjamin Crane was void, but contended that from the reference to the power made in the will, the testatrix intended to make a contingent will, and one which was only to operate in the event of Benjamin Crane surviving her, as was proved by several passages in it. The intention of the testatrix must alone be regarded. *Parsons v. Lenst*, 1 Ves. Sen. 189. See also *Nichols v. Nichols*, 2 Phill. 180, where a will, not written with testamentary intention, was set aside. He submitted that probate ought not to be granted of this paper.

SOUTHALL AND
HUXLEY
v.
JONES.

Mr. Shapter, Q.C., in reply.

SIR C. CRESSWELL: The plaintiffs in this case claimed to be executors of Catherine Wood, otherwise Crane, and propounded as her will an instrument executed by her so as to satisfy 1 Vict. 26. The defendant, who was only sister and next of kin of the deceased, denied that the instrument propounded was the last will and testament of the deceased, having been executed as under and in pursuance of a power which never arose.

The circumstances of the case were singular. The deceased, Catherine Wood, was about to marry Benjamin Crane, a widower, who had been the husband of her sister then deceased, and in contemplation of the intended marriage a deed was executed, whereby certain property of Catherine Wood was vested in trustees in trust for Catherine Wood till the marriage, afterwards in trust for Benjamin Crane and Catherine during their respective lives, and after the decease of the survivor in trust for the children of the marriage, and if no child the trustees were to stand possessed upon the trusts following, namely, in case the said Catherine Wood should survive Benjamin Crane, then in trust for Catherine Wood, but if she should die in the lifetime of Benjamin Crane, then in trust for such persons as the said Catherine Wood should by deed or will, notwithstanding her coverture, appoint; and in default of appointment, for her next of kin. The marriage was, in form, solemnized, and afterwards, on the 4th of October, 1842, Catherine Wood executed an instrument as a will, which is to the follow-

ing effect :—" I, Catherine Crane, wife of Benjamin Crane, 1859.
 "(late Catherine Wood, spinster), do make, publish, and de- March 5 & 23.
 "clare this to be my last will and testament, in manner fol-
 "lowing; that is to say, whereas, by the settlement made SOUTHALL AND
 "previous to and in contemplation of my marriage with my HUXLEY
 "said dear husband, Benjamin Crane, bearing date the 29th
 "day of June last past, and made between James Best, Jemima
 "Woods, myself, as executor and executrices of my late father
 "Richard Wood, deceased, of the first part; myself, of the
 "second part; the said Benjamin Crane, of the third part; and
 "W. R. Grape and Edward Southall, of the fourth part; cer-
 "tain moneys and personal estate lately belonging to me were
 "transferred to and vested in Mr. W. P. Grape and Mr. Ed-
 "ward Southall, the trustees of such settlement, in trust for
 "myself and my said dear husband successively during our
 "respective lives; and after the decease of my dear husband,
 "in case of his surviving me and in case I shall leave no
 "child, in trust for such person or persons, for such estate or
 "estates, interest or interests, in such parts, etc., as I shall,
 "by my last will and testament in writing, or by any codicil
 "or codicils thereto, to be respectively executed by me in the
 "presence of and attested by two or more witnesses, direct,
 "appoint, give, or bequeath the same. Now I do hereby
 "ratify and confirm the said settlement, and in pursuance and
 "exercise of the power thereby reserved to me, and of all other
 "powers enabling me in this behalf, I do by this my last will
 "and testament direct and appoint that the said W. P. Grape
 "and Edward Southall, or other the trustees or trustee for the
 "time being of the said settlement, do and shall stand pos-
 "sessed of and interested in all and singular the trust-moneys,
 "etc., from and after the decease of the said Benjamin Crane,
 "and such failure of issue as in the said settlement mentioned,
 "in trust for such of several persons hereinafter named, as
 "shall be living at the time of the decease of the said Benja-
 "min Crane." (Then about sixteen legatces in specific sums are
 "constituted.) "And as to the residuc of the trust-moneys
 "and personal estates comprised in the said settlement, from
 "and after the payment of the said legacies, which I direct to
 "be paid at the end of six months after the decease of the
 "said Benjamin Crane, and the expense of proving this my

1859. "will, I do hereby give and bequeath one moiety thereof to
 March 5 & 25. "such person or persons as my said dear husband, Benjamin
 ——— "Crane, shall by deed or will direct or appoint, and in default
 SOUTHALE AND "of appointment, to his next of kin, and the other moiety
 HUXLEY "thereof to my sister. And whereas on my marriage with
 v. "my said dear husband, Benjamin Crane, he became entitled
 JONES. "in right of such marriage to certain personal estate belong-
 "ing to me, which was not comprised in the before-mentioned
 "settlement, and I am desirous of leaving certain legacies
 "payable immediately on my decease, I do therefore hereby
 "request my said dear husband to pay out of such personal
 "estate, notwithstanding the same is now become all his own
 "property, the following legacies," etc.

Benjamin Crane died in 1846; Catherine Wood *alias* Crane, in 1857.

For the plaintiffs it was contended that no marriage between Catherine Wood and Benjamin Crane ever took place, and that consequently the trustees always held the property in trust for her, and that her will was a valid disposition of it, notwithstanding the reference therein made to the power, for that the testatrix not only referred to the power in the settlement, but to all other powers enabling her to dispose of the property: and the case of *Dobbins v. Bowman*, 3 Atk. 408, was relied on.

On the other side, for the next of kin, it was not denied that the marriage solemnized in form between Catherine Wood and Benjamin Crane was altogether void, but it was contended that the reference to the power showed that the testatrix intended to make a contingent will only,—that is, a will to take effect in the event of her nominal husband surviving her, and not otherwise. But I am of opinion that I cannot presume that the testatrix intended that her will should have such a limited operation. Why should she wish to benefit certain persons, if she had a limited and contingent authority to do so, and not if it was absolute and unlimited? It is clear that she did not mean her will to dispose of the property until after Benjamin Crane's death, and there is reason to suppose that she thought her right to dispose of it depended on the power in the settlement, and therefore she referred to it; but I think it cannot be disputed, that she intended to give the money in a certain

manner in whatever way her authority to do so was acquired, and as she had an absolute power over it, that supports the will, although the special power never arose. The observations in Sugden on Powers (p. 309, 5th edit.) on *Dobbins v. Bowman*, show that the learned author considered it an authority to this extent. He there says, " But if the testator exercised a power " by will, and it turn out that the power was either not well created, or was defeated by the happening of a contingent event " subsequently to the will, the divisor's interest at the time of " the will shall come in aid of his disposition, for in a will " there are no particular words required to pass the estate, " but any words that show the intention of the testator are " sufficient." I must therefore decree probate as prayed.

1859.

March 23.

SOUTHALL AND
HUXLEY
v.
JONES.

Dr. Deane, Q.C., asked for the defendant's cost out of the estate, which the learned Judge granted.

In the Goods of HENRY BISHOP (deceased).

March 30.

Administration.—Presumption of Death at Sea.—Lapse of Time insufficient.—Inquiries after Crew of lost Vessel. In the Goods of HENRY BISHOP.

H. B., on the 20th of October, 1858, sailed in command of a vessel from Demerara bound to London. Nothing having since been heard of the vessel, she was supposed to have foundered at sea with all her crew. On application for a grant of administration to the widow of H. B.:

Held, that the time which had elapsed since the vessel sailed being only five months, the application was premature; that inquiry should be made at Demerara whether anything had been heard of any of the crew who might have survived.

Henry Bishop, master mariner, sailed on the 20th day of July, 1858, from Cork, in command of the brig 'Zarifa,' bound on a voyage to Barbadoes and Demerara, and from thence back to London. The brig arrived at Demerara towards the end of September, 1858, and on the 23rd day of October following sailed from Demerara with her master (Henry Bishop) on board, bound for London. Since that time neither the

1859. brig, the master, nor any of the crew had been heard of, and
March 30. it was supposed that the brig, with all on board, had perished
 at sea. J. Eagle, a friend of the deceased, who was at Deme-
In the Goods of rara when the 'Zarifa' sailed, deposed that a hurricane had
HENRY passed over the West Indies five or six days after the vessel
BISHOP. sailed from thence. The vessel was insured, and one of the
 part-owners of the vessel deposed that the underwriters were
 satisfied of the loss, and had arranged for the payment of the
 amount insured thereon.

Mr. Swan moved the Court to decree letters of administration of the effects of the said Henry Bishop, deceased, as having died in or since the month of October, 1858, intestate, to be granted to Emma Bishop, his widow.

SIR C. CRESSWELL: The underwriters have not yet proved their belief in the loss of the vessel by payment of the policy. Independently of this, I think probably the vessel is lost, but it does not appear that any inquiries have been made at Demerara, as to whether any of the crew have arrived there, or have been heard of. I think also you have made your application too early, and that it would not be safe as yet to grant letters of administration. It is only five months since Henry Bishop sailed from Demerara; he may have been picked up by some ship, and carried to some distant port, whence he has not hitherto been able to make his way home. I am not aware that the Court in a case of this nature has ever acted so speedily. I reject the motion.

Mr. Swan: Will the Court name any time when it would feel able to grant the motion?

SIR C. CRESSWELL: No; I cannot name any time. Inquiries ought to be made after any of the crew who may have survived.

Motion rejected.

IREDALE v. FORD AND BRAMWORTH.

Administration.—Bankrupt.—Majority of Interests.—Practice.

1859.

April 6.

IREDALE
v.
FORD AND
BRAMWORTH.

Of the two rules for the guidance of the discretion of the Court in granting administration, where parties in equal degree dispute it, viz. "that, *ceteris paribus*, the male is preferred to the female," and "that the grant will follow the majority of interests"—the latter is the more stringent. The fact of a man having been bankrupt many years since is not to be pressed against him; but when he has been a second time a bankrupt, and under the second bankruptcy no dividend has been paid, *quære*, whether such bankrupt could be said to have any interest in the intestate's estate?

The grant being made to persons representing three-fourths of the interest, their sureties were ordered to justify to the extent of the other fourth; their costs were directed to be paid out of the estate, and no order was made as to costs of the other party.

This was a question heard on petition and affidavit, as to the administration of the effects of T. Iredale, who died intestate, a widower, without child or parent, leaving William Iredale his brother, Sarah Ford, wife of T. Ford, Elizabeth Bramworth, widow, and Mary Richardson, widow, his sisters, his only next of kin, and the only persons entitled in distribution. The deceased had been for many years a lunatic, and William Iredale had since 1838 been the duly appointed committee of his person.

Dr. Waddilove and *Mr. Malcolm Kerr* applied for the grant to be made to William Iredale the brother, and relied on the maxim, that by the practice of the Court the male is preferred to the female, as more likely to be acquainted with and able to conduct business. *Chittenden v. Knight*, 2 Lee, 559. As to the fact of his having been twice bankrupt, in 1827 and 1837, and no dividend paid under the last bankruptcy, *Bell v. Timiswood*, 2 Phill. 22, would be relied on by the other side; that case was decided in 1812, and there is no reported case since which shows that it has been followed. Iredale offered two unexceptionable securities for the due administration of the estate.

Dr. Spinks and *Mr. Swan*, for the two sisters: It was for

1858. the other side to show that these parties are not proper to be
April 6. entrusted with the administration. We rely on the general
maxim that the grant follows the majority of interests; the
corollary from which is, that when persons equally entitled
IREDALE are disputing the administration, the grant will follow the ma-
v. jority of interests, unless there is a substantial objection to
FORD AND the party asking for the grant. *Budd v. Silver*, 2 Phill. 115;
BRAMWORTH. *Warwick v. Greville*, 1 Phill. 123. Our application is sup-
ported by three-fourths of the interests. Two of the sisters
apply for the grant, and the third has executed a proxy of con-
sent. It is doubtful whether Iredale under the second bank-
ruptcy has any real interest in the matter.

Dr. Waddilove, in reply.

SIR C. CRESSWELL: There are several *dicta* in the books on the subject of the rules which guide the discretion of the Court in granting administration, where the statute does not apply. *Dr. Waddilove* is right in stating that, *cæteris paribus*, males are preferred to females; but there is another principle relied on by *Dr. Spinks*, that the grant will follow the majority of interests, and will be made as desired by the majority of interests. I think this is a more stringent rule than the one giving a preference to males over females. Here three-fourths, at least, of the interests desire the administration to be granted to the two sisters; the remaining fourth—supposing the brother has any interest at all, which is very questionable—wishes it to be granted to himself. He has been twice a bankrupt, and as he paid no dividend under the last bankruptcy, it is probable his whole interest would vest in his assignees. In many cases it might be very hard to press against a man the circumstance of his having been bankrupt many years ago; he may have entirely recovered himself; but that is not the case here. It is further said that he has by deed assigned his interest in his property; and he does not deny that he executed such a deed, but says that he is advised that it cannot be enforced in law. Again, with reference to the position of the parties, I dare say he is a respectable man; he has been committee of the person of the lunatic for several years. The committee of the lunatic's estate offers

to become surety for him, and speaks well of him; and, what is more to the purpose, it may be presumed that the authorities in lunacy were satisfied with his conduct. But there are a good many judgments against him in a rather short time in County Courts; two are unsatisfied, and his explanation as to those—that he had made himself liable for debts of his son-in-law—is by no means satisfactory. Mr. Emmett is a well-known solicitor; but from his affidavit he does not seem to have had much confidence in his own client, for he stipulates that the whole of the business should be transacted in his own office. As to the sisters, they may be in a humble position in life, and their means small; but it does not appear that he has any means at all. On the whole, therefore, but principally on the rule that the grant should follow the majority of interests, and bearing in mind that this is not a case of forcing joint administration, which should certainly be avoided, I think I am bound to grant administration to the sisters; their sureties to justify to the extent of the one-fourth not included in their consent. I shall not condemn Iredale in costs; he had several plausible topics to advance. Those who have succeeded are entitled to their costs out of the estate, and I make no order as to Iredale's costs.

1859.

April 6.

IREDALE

v.

FORD AND
BRAMWORTH.

C A S E S

IN THE

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

1858.
July 16 & 29.

(Before the JUDGE ORDINARY.)

WELLS v. WELLS.

WELLS
v.
WELLS.

*Costs of Wife.—Plea of Condonation not established.—
Practice.*

A husband promoted a suit in the Consistory Court of London against his wife for a divorce *à mensâ et thoro* by reason of her adultery.

A libel was brought in by the husband charging the adultery, and a responsive allegation by the wife denying it; witnesses were examined on the libel and allegation, and after publication of their evidence the wife brought in additional articles, (verified, according to the practice of the Ecclesiastical Courts, by the wife's affidavit), pleading condonation during the progress of the suit.

Witnesses were examined on the additional articles, but at the hearing the plea of condonation set up by them was abandoned by the counsel for the wife on the ground that the evidence in support of it failed. Upon an application by the proctor for the wife for an order on the husband to pay the costs incurred by him in respect of the additional articles :

Held, that in the Ecclesiastical Court the proctor of a wife defending a suit for divorce was entitled to receive from the husband the reasonable costs for conducting her defence :

That a proctor refusing to bring before the Court any defence set up by the wife not plainly unfounded would incur a very grave responsibility, and that the wife's proctor was therefore, in the present case, entitled to have his costs from the husband.

This was a cause for divorce *à mensâ et thoro*, which had been transferred to this Court from the Consistory Court of

London, promoted by George Wells against his wife, Eliza Amelia Wells, by reason of her adultery. 1858.

July 16 & 29.

A libel was brought in on behalf of the husband, in Hilary Term, 1857, wherein he charged his wife with adultery with two persons of the names of Berriman and Wildman, and witnesses were examined upon it; the wife brought in a responsive allegation on the 6th of May, 1857, denying that she had committed the adultery charged against her in the libel, upon which witnesses were also examined.

WELLS
v.
WELLS.

The evidence was subsequently published, and after its publication in December, 1857, and a few days prior to the Act of 20 & 21 Vict. c. 85, coming into operation, by which the jurisdiction of the Ecclesiastical Courts in matters matrimonial was transferred to this Court, additional articles were given in on behalf of the wife, alleging that during the pendency of the suit, namely, in the same month of December (1857), the husband had condoned the alleged adultery of the wife.

The wife, in the additional articles, pleaded :

1st. That on Sunday, the 13th of December, 1857, George Wells (the husband) having met her (the wife) in the street, accosted her in the presence of Joseph Shanti, asked her forgiveness for his past conduct towards her, and said he had the same heart and hand for her as he formerly had; that after further conversation between them he appointed to meet her in the afternoon of the following Tuesday, at the house of a mutual friend, M'Quillin. 2nd. That pursuant to the said appointment they met on the following Tuesday (December the 15th) at the house of M'Quillin, and were then and there reconciled, and mutually forgave each other for and in respect of all matters which had been in dispute between them, and that the husband in token of such reconciliation with his said wife then gave her a ring. 3rd. That on Monday, the 21st of December, 1857, they again, by the husband's appointment, met at the house of M'Quillin, when the husband promised to bring their little boy to see the wife on the following day. 4th. That on the following morning they again met at the said house of M'Quillin. That during the last-mentioned interview the husband expressed to his wife his disbelief of the charges which he had been induced to make against

1858.
July 16 & 29.

WELLS
v.
WELLS.

her in the Consistory Court of London, and promised to return to her on Monday the 28th instant, and bring their children to see her; and further, that during the said interview the husband and wife were alone in a room in the said house together, and had sexual connection. 5th. That the husband by reason of the aforesaid facts had condoned the previous acts of adultery pleaded by him to have been committed by his said wife, if the same had indeed taken place.

On the 1st and 2nd of the additional articles Joseph Shanti was examined, and on the 2nd, 3rd, and 4th, M'Quillin. By the evidence of both of these witnesses, it appeared that the husband had only promised to forgive his wife and to take her back in the event of her not being proved guilty of adultery, which he said would soon be seen. With reference to their having had sexual connection on the 22nd of December, as in the 4th article alleged, M'Quillin deposed that the husband and wife on the occasion referred to were only together for about twenty minutes in the front sitting-room of his house, the window of which was next to the pavement, and the sill not more than three feet high, so that passers-by could see what was going on in the room; that there was then no blind to the window; that the said front room was adjoining to that used as the common sitting-room of the family, with a door of communication between the two rooms; that whilst Mr. and Mrs. Wells were alone in the said front room the said door was ajar, and several of the family were in and out of the said adjoining sitting-room; and that under these circumstances he did not believe they could have had sexual connection on that occasion. That if they had been in the back parlour he might have thought of something of the kind taking place.

This witness further stated that he had refused to receive Mrs. Wells into his house, in consequence of her saying that Mr. Wells had connection with her in his front parlour.

Dr. Addams, Q.C., and *Dr. Curteis* appeared for the husband.

Dr. Tristram appeared for the wife, and contended that the evidence failed to establish the adultery charged against her.

He, however, abandoned the plea of condonation set up by the additional articles on the ground that there was not sufficient evidence to support it; but he asked the Court to order that the costs incurred by the proctor of the wife in respect of the additional articles, should be paid by the husband. By the practice of the Ecclesiastical Court the proctor of the wife, against whom a suit for divorce had been instituted, was entitled to receive from the husband the costs incurred in defending her. These, with the exception of the costs of the additional articles, had been paid. An application had been made, prior to the hearing, to his Lordship in chambers for them. This application had been opposed, and the discussion of the question was directed to be reserved until the hearing of the cause. It was submitted, that though the evidence failed to sustain these articles, the wife's proctor under the circumstances of the case was still entitled to the costs incurred by him in respect of them. By the practice of the Ecclesiastical Court additional articles were not admitted after publication of the evidence, unless the party bringing them in verified the facts therein pleaded by affidavit. Mrs. Wells had communicated the facts pleaded to her proctor; she subsequently verified them by affidavit; and if established, they would have been a good answer to the suit. Her proctor, thus informed, was bound to bring them in. It might be said on the other side that, before bringing them in, he should have satisfied himself that they would have been sustained by M'Quillin's evidence. But M'Quillin was an unwilling witness; and he even stated that if Mr. and Mrs. Wells had been together alone in the back parlour instead of in the front room, he might have suspected that they had had connection.

1858.

July 16 & 29.

WELLS
v.
WELLS.

Dr. Curteis, in reply: It was entirely through the negligence of the proctor in not ascertaining that he had good evidence to support the additional articles that these costs were incurred. The husband ought not, therefore, to have to pay them.

Cur. adv. vult.

THE JUDGE ORDINARY now delivered judgment: After an examination of the evidence he pronounced the charge against Mrs. Wells of adultery with Berriman not to have been proved,

July 29.

1859.

July 29.

WELLS

v.

WELLS.

but the charge of her having committed adultery with Wildman to have been established, and thereupon decreed a judicial separation. He then continued:—I must now dispose of a question that was reserved respecting the costs of the additional articles setting up condonation. In the Consistory Court the proctor defending a wife in a suit for divorce was always considered to be entitled to receive from the husband the reasonable costs of conducting that defence, but it was said in this case that the period at which the condonation, which was made the subject-matter of the additional articles, was alleged to have taken place, ought to have excited the vigilance of the proctor, and that if he had exercised reasonable care in ascertaining what evidence his client could produce to support them, he must have known that there was no ground for such a defence, and therefore he ought not to have put the husband to the costs occasioned by it. It is difficult to draw the line in such cases, and a proctor refusing to bring before the Court any defence set up by his client, and not plainly unfounded, would incur a very grave responsibility, and therefore I think the costs must be allowed, although I cannot doubt that there was a miserable conspiracy to entrap the husband into a position which might be urged as evidence of condonation; and if anything were necessary to confirm my opinion as to there being good ground for the suit, it would be supplied by this attempt to defeat it by matter subsequent.

Nov. 9 and
Dec. 10.

(Before the JUDGE ORDINARY.)

MARSH v. MARSH.

MARSH

v.

MARSH.

*Judicial Separation at Suit of Wife.—Cruelty by a Husband
addicted to Intemperance.—Custody of Children.—20 & 21
Vict. c. 85, s. 75.*

A husband, who had for six years been addicted to intemperance, and had suffered from *delirium tremens*, had on occasions inflicted bodily injury on his wife, and had by his general course of conduct towards her materially injured her health.

Held, that the Court being satisfied from the whole course of the evidence, that the wife could not return to cohabitation without incurring great peril of a renewal of the bodily injuries inflicted upon her, she was entitled to a judicial separation.

1858.

Nov. 9 and
December 10.

That where the Court decrees a judicial separation at the suit of the wife by reason of cruelty, it will, in making an order as to the custody of the children under section 35 of the Divorce Act, according to the circumstances of the case, exercise a discretionary power, exceeding that which is exercised by Courts of Law and Equity respecting the custody of infants.

MARSH
v.
MARSH.

In the present case, though there was no suggestion that the children had been cruelly or improperly treated by the husband, the Court directed the children to remain in the custody of the mother so long as she maintained and properly educated them without expense to her husband, (he to have proper access to them), till they should respectively attain fourteen years of age.

This was a petition for judicial separation by reason of cruelty, at the suit of the wife against the husband; there was also an application for the custody of the children. The substance of the evidence is fully stated in the judgment.

Dr. Deane, Q.C., and Dr. Spinks for the petitioner.

Mr. Macnamara for the respondent.

As respects the custody of children some remarks of Lord Eldon in *Wellesley v. Wellesley*, 2 Russ., were cited, and it appeared in evidence that the children were at the time of the hearing being maintained and educated at the expense of the mother.

Cur. adv. vult.

THE JUDGE ORDINARY: This was a petition for judicial separation on the ground of cruelty: the respondent denied the cruelty charged. The evidence was very short. The parties were married in 1850; according to the evidence of the wife, two years after the marriage her husband's habits became very intemperate and his conduct to her very harsh; he frequently swore at her and called her vile names without any cause or provocation. His intemperance increased to so great an extent, that in 1856 he would sometimes lie in bed for two or three weeks, and compel his wife to supply him with drink there. In November, 1856, on one of these occasions, he

December 10.

1858. desired his wife to get up in the night and fetch him drink ;
 December 10. she remonstrated, whereupon he seized her by the throat and
 said he would throttle her if she did not bring it ; she ex-
 claimed, " William, you will never murder the mother of your
 children," whereupon he relaxed his hold, and she fled to his
 mother's room, who got up, and passed the night with her
 downstairs, and two farming men were called in to remain
 with him. In July, 1857, another scene of the same kind
 occurred ; he was still more intemperate, and his fits of
 violence were more frequent. On one occasion when she had
 left his room for a few minutes to walk in the garden, on her
 return he was angry, leaped out of bed, and took her by the
 throat. She cried out ; his mother came in and threatened to
 call to his farming men for assistance if he did not release her.
 He did so, and she and his mother left the room together. In
 March, 1858, he had another long fit of intemperance, and
 kept his bed for some weeks. His wife and a female servant
 slept on the floor in his room ; one night he called for drink,
 and on her hesitating to go for it, he got up, seized the poker,
 and threatened to beat her brains out ; the servant interposed
 to protect her ; the two then went and brought him drink,
 and he afterwards fell asleep. After this she never remained
 with him alone. On Saturday, the 20th of March, she passed
 the night in his room by his desire, a man named Parker, the
 farm bailiff, being placed there also for her protection. In the
 morning she went into another room, and was looking out at
 the window, when the respondent came behind her, seized her
 by the throat with both hands and squeezed it so violently
 that she was much injured, and the marks of his nails and
 fingers were seen by more than one witness ; the female servant
 went to her assistance, and then he released her. In conse-
 quence of this outrage, and the advice of her brothers, she left
 him and went to her mother's, and has remained there ever
 since. It appeared further, by the evidence of a medical man,
 that when she returned home her health was much broken ;
 she was emaciated, so as to appear in a rapid decline ; her
 appetite had entirely failed, and she was in a state of nervous
 apprehension, which deprived her of sleep. The respondent,
 on his own behalf, did not deny that he at times used violent
 language, but ascribed it to his having indulged in drinking

MARSH
 v.
 MARSH.

in consequence of pecuniary losses. He asserted that he had no recollection of threatening to throttle her or of taking her by the throat, and he positively denied having done so on the last occasion deposed to by her. To corroborate his statement, he called the man Parker, who disgraced himself as a witness by endeavouring to give a false colour to the transaction, but was obliged to admit that he was placed in Mr. Marsh's room to prevent his offering violence to his wife. If the account given by the wife was not true, his mother would have been an important witness for him, but she was not called, nor any reason assigned for not doing so. The evidence given by and on behalf of the wife convinced the Court that she had been on various occasions treated with cruelty, and that her health had been materially injured by the husband's general course of conduct towards her; nor did the counsel for the defendant controvert this, but he contended, (and it was the only ground on which the respondent's case could be rested,) that apparently on the occasions spoken to he was suffering from *delirium tremens*; and that having recovered from that disorder, he was now to be treated as a sane man, and not to be punished for acts done when he was not a responsible agent. But the whole course of the evidence satisfies me that the wife could not return to cohabitation with her husband, without incurring great peril of a renewal of the bodily injuries inflicted upon her. The respondent had undoubtedly for six years led a life of gross intemperance; on various occasions for weeks together he displayed a total want of self-control, and his wife was in constant danger of bodily injury. I am slow to believe in the sudden reformation of a confirmed drunkard, and certainly there was nothing in the demeanour of the man, when examined in Court, calculated to create confidence in the temperance or calmness of his future conduct. I feel, therefore, bound to protect the wife from the peril of a renewed cohabitation with such a man, and accordingly decree a judicial separation between them. Another and more embarrassing question was raised respecting the custody of the children of these parties. It appeared that they have four; the eldest a girl aged seven, the second a boy aged four, and two girls younger. The section of 20 & 21 Vict. c. 85, which gives me authority in this respect, is the 35th: "In any

1858.

December 10.

 MARSH
v.
MARSH.

1858.
December 10. **MARSH**
v.
MARSH.
- "suit or other proceeding for obtaining a judicial separation
"or a decree of nullity of marriage, or on any petition for
"dissolving a marriage, the Court may from time to time,
"before making its final decree, make such interim orders,
"and may make such provision in the final decree as it may
"deem just and proper with respect to the custody, maintenance, and education of the children, the marriage of whose
"parents is the subject of such suit or other proceeding, and
"may, if it shall think fit, direct proper proceedings to be
"taken for placing such children under the protection of the
"Court of Chancery." "Just and proper,"—this is not a
general power of dealing with the custody of children; it
exists only where there is a suit for obtaining a judicial separation, a decree of nullity or dissolution of a marriage. I
apprehend, therefore, that the words "just and proper" are
to be construed with reference to the circumstances affecting
the suit, and not merely with reference to the rules by which
courts of equity and common law have been governed in questions
respecting the custody of infants; in short, that it was
the intention of the Legislature to give a discretionary power
to the Court exceeding that which had been previously exercised
by courts of law and equity, and I collect that such is the
opinion entertained by Lord St. Leonards from a passage in his
'Handy Book,' p. 75. I think it would not be just to compel
the unoffending mother to resort to any place where the father
might choose to place them—perchance to his own house—for
the purpose of seeing them. If he is put to any trouble about
going to see them, that will arise from his own misconduct;
and therefore, although it does not appear that he was ever
guilty of any cruelty or unkindness to his children, and there
may not at present be any fear of their being contaminated
by his evil example, I think it just and proper that they
should remain under the control of their mother so long as
she has the means of giving them a suitable education and
the inclination to do so. I therefore make it part of my
decree that the children shall remain in the custody and under
the control of their mother, the petitioner, until the age of
fourteen, when they may by law exercise their own choice in
the matter, provided she keeps and maintains at school such
of them as are of a fit age to be sent there, without subjecting

her husband to expense. The husband always to have information of the schools at which they are placed, and to have the same access to them there as is allowed to the parents of other children at the same schools. As long as any one of them is kept by its mother at her home, as being too young to be sent to school, the respondent to have access to it there once a week at any reasonable hour.

1858.
December 10.

MARSH
v.
MARSH.

(Before the JUDGE ORDINARY.)

December 11.

SHIRLEY v. WARDROP (falsely called SHIRLEY).

SHIRLEY
v.
WARDROP.

*Suit for Nullity of Marriage.—Alimony pendente lite.—
Reduction.*

In April, 1857, in a suit for nullity of marriage brought by the husband against the wife, alimony *pendente lite* was agreed upon at £300 per annum, and confirmed by order of Court. On application for reduction of such rate of alimony, on the husband's affidavit that his income in 1857 was £1200, and now only £949, but not explaining how such reduction had been caused, nor stating when or how a certain sum of £10,000 had been spent, the Court refused to interfere.

This was an application for reduction of alimony *pendente lite*. A suit for nullity of marriage, which was instituted in the Consistorial Court of London, was now transferred to this Court, and had been pending between Colonel Shirley and his wife since November, 1856. In April, 1857, alimony *pendente lite* was taken by consent of the parties at the rate of £300 per annum,—a sum based on the actual income then enjoyed by Colonel Shirley, viz. £1200 per annum,—and confirmed by an order of the Court. Colonel Shirley now claimed a reduction of alimony, on the ground, as stated by him in an affidavit, that since April, 1857, his income had decreased, and that he had now no more than a net income of £949, of which he set forth the particulars. Mrs. Shirley, in a counter-affidavit, stated that besides the sums specified by Colonel Shirley, he had received

1858. in or about the year 1852, about £10,000, on selling out
December 11. of his then regiment, and in the year 1856, a legacy of £500
under the will of his father. In a further affidavit, Colonel
SHIRLEY admitted the receipt of between £9000 and £10,000
v. Shirley admitted the receipt of between £9000 and £10,000
WARDROP. for the sale of his commission; but stated that such money
had been subsequently spent as well as the £500 he received
under his father's will; that his income when the rate of
alimony was agreed upon was £1200, and was now reduced
to £949.

Dr. Twiss, Q.C., for Colonel Shirley, cited, in support of his application, *Cox v. Cox*, 3 Add. 276, where, in a suit for restitution of conjugal rights, a sum of £300 per annum, as alimony *pendente lite*, on an income of £1680, had been allotted, and the Court, on the husband's affidavit that his income, as one of the commissioners for settling Spanish claims, had been reduced from £1500 to £1000 per annum, and that another source of income had produced only £80 instead of £150 as admitted in his answer to the allegation of faculties, was pleased to reduce the alimony to the rate of £220 per annum.

Dr. Phillimore, Q.C., contra: This is a suit for nullity of marriage after twenty years' cohabitation; no slur whatever can be inferred against Mrs. Shirley's moral character; the rate of alimony was taken by consent, so that Mrs. Shirley had never had any opportunity of filing an allegation of faculties or petition for alimony; as regards Colonel Shirley's affidavit *non constat*, the sums sworn to have been spent were not spent before the rate of alimony was agreed to.

THE JUDGE ORDINARY: Under the circumstances of this case, I shall not interfere to reduce the alimony.

It seems that shortly after the suit was instituted an arrangement was made between the parties, that Colonel Shirley should pay his wife by way of alimony *pendente lite* £300 per annum. He now asks that this arrangement may be altered, on the ground that when he agreed to it, his income was £1200, and that it is now reduced to £949. If he had shown,

that it had been diminished owing to any misfortune, or to events over which he had no control, he would have brought himself within the case of *Cox v. Cox*, where it seems that the husband's income had been diminished in consequence of the reduction of his stipend under the Government without any default on his part. But Colonel Shirley does not tell the Court how his income came to be diminished, or what he had at the time of the arrangement which has now failed him, nor does he state when or how he spent the £10,000 he received for his commission. If he has been indulging in wilful expenses or extravagant amusements, I do not think that, at the present stage of the proceedings at least, the wife should suffer.

Motion rejected.

1858.
December 11
SHIRLEY
v.
WARDROP.

(*Before the JUDGE ORDINARY and a Special Jury.*)

CHERRY v. CHERRY.

*Petition for Restitution of Conjugal Rights.—Plea of Cruelty.
—Practice.—Right to begin.*

December 15.
CHERRY
v.
CHERRY.

In a petition for restitution of conjugal rights by the husband, to which the wife answered by pleading his cruelty, and the husband took issue thereon, the Court, after hearing counsel, held that substantially the affirmative issue was on the respondent, and that her counsel had a right to begin.

This was a petition for restitution of conjugal rights, at the suit of the husband against the wife. She pleaded cruelty, and issue was joined thereon. The case was set down for hearing before a special jury. The record for the jury (see sections 37, 38, of Divorce Act, and rule 22) was in the following terms:—

“ Henry Curtis Cherry v. Emily Cherry.

*“ Henry Curtis Cherry did, in his petition presented in this
“ cause, allege that the said Emily Cherry did, on the 29th of
“ September, 1855, without lawful cause, leave his residence at
“ Burghfield, and did from the said day up to the date of the
“ said petition, to wit, the 15th of February, 1858 (with the
“ exception of two or three days in the month of September,*

1858. "1856), withdraw herself from cohabitation with him, and re-
December 15. "fuse to render him conjugal rights. And Emily Cherry did
CHERRY "in answer thereto deny that she withdrew herself from coha-
v. "bitation with the said H. C. Cherry, the petitioner in this
CHERRY. "cause, as set forth in the said petition, without lawful cause ;
"and the said Emily Cherry did further say that, from the date
"of her marriage, to wit, the 22nd of August, 1853, and up to
"the 8th of September, 1856, inclusive, she frequently suffered
"from the insulting, degrading, and cruel conduct of the said
"H. C. Cherry ; and more particularly on the 31st of August,
"1856, and the 8th of September, 1856, at Reading ; and also
"on the 8th and 9th of September, 1856, at the residence of
"the said H. C. Cherry ; and that by reason of his threats of
"further personal violence, she, subsequent to the 9th of Sep-
"tember, 1856, has been compelled to obtain protection from
"her Majesty's Court of Queen's Bench.
"Whereupon the said H. C. Cherry denied the truth of the
"allegations contained in the said answer, and joined issue
"thereon. Therefore let a jury come."

Mr. Wilde, Q.C., Dr. Deane, Q.C., and Mr. Maude, for the petitioner.

Mr. Huddleston, Q.C., Dr. Robertson, and Mr. Coleridge, for the respondent.

On the question of right to begin after hearing counsel,

THE JUDGE ORDINARY : I think substantially the affirmative issue is on the respondent. She means by her answer not to deny that she withdrew at all, but she denies that she withdrew without reasonable cause, and specifies that cause, which she is bound to prove. I think, therefore, her counsel have a right to begin.

(Before the JUDGE ORDINARY.)

STUDDY v. STUDDY.

1858.

Dec. 20 & 23.

STUDDY
v
STUDDY.*Judicial Separation.—Construction of Agreement to live separate.—Adultery.—Leave and License.—Connivance.*

A husband and a wife executed an agreement to live separate on certain conditions. The last clause in the agreement was as follows:—"Mrs. Studdy (the wife) promises, that if she does not fulfil her part of the agreement, Major Studdy (the husband) shall have the full power of a husband over her, whatever his way of living may be." The wife petitioned for judicial separation, by reason of her husband's adultery before the separation (unknown to her), and also since the separation. The husband pleaded connivance, and in support of his plea relied on the last clause in the agreement.

Held, that the words in the agreement, "whatever his way of living may be," might be construed to apply to the place where and to the mode in which the husband might choose to live in reference to his establishment, and that as an innocent meaning might fairly be given to these words, the Court would not presume the immoral contract asserted to have been intended, and that the petitioner was entitled to the relief prayed.

This was a petition for judicial separation at the suit of the wife by reason of adultery; the husband relied on the terms of an agreement to live separate, which was signed by the parties in October, 1857, as amounting to leave, license, and connivance. There was no other point of consequence in the case, and the agreement is set out in the judgment.

Dr. Addams, Q.C., and Mr. T. Jones, for the petitioner.

Mr. K. Macaulay, Q.C., and Dr. Spinks, for the respondent.
Cur. adv. vult.

THE JUDGE ORDINARY: In this case Mrs. Studdy petitioned for a decree of judicial separation, on the ground of adultery, and the petition stated that the marriage was in 1852; that in 1855 the respondent committed adultery with Jane Hodges, their domestic servant, but that the fact had only recently come to the petitioner's knowledge; that in October, 1857, a separation took place between her and her

December 23.

1858. husband, and that she had recently discovered that after the
 December 23. separation he carried on an adulterous intercourse with Jane
 STUDDY Hodges, and that they were still cohabiting together as man
 v. and wife. The respondent, in his answer, stated that the
 STUDDY. petitioner was, in 1855, well aware of his having committed
 adultery with Jane Hodges, and afterwards continued to
 cohabit with him until October, 1857; and that as to his
 subsequent cohabitation with Jane Hodges, the petitioner had
 no right to complain, for that at the time of the separation she
 gave him leave and license to live as he thought proper, and that
 the petitioner at such time well knew that he (the respondent)
 purposed seeking for, and, if possible, cohabiting with the said
 Jane Hodges, and offered no objection, but on the contrary,
 assented thereto, and connived thereat. The petitioner replied
 that her continued cohabitation with the respondent was in
 ignorance of the adultery with Jane Hodges, and she denied
 the license and connivance alleged, but said that her husband,
 by threats of ill-treatment, compelled her to write from his
 dictation a paper which both signed. The Respondent re-
 joined that he did not by threats compel her to write and
 sign the said paper.

The paper is in these words:—"Mrs. Studdy to make over
 " to Major Studdy Oldways and its land, and all she possesses
 " at this present time in the funds, above £275 per annum
 " when Oldways is let, and above £250 when vacant. Major
 " Studdy to make no further pecuniary or other demands on
 " his wife, even should any money or other property be given
 " her; but should any of her relations die, excepting her sister
 " Mary Denistoun, she has agreed to give her husband at the
 " rate of £25 in every £100 of any money she may be receiv-
 " ing above the £275 per annum. Major Studdy to give
 " Mrs. Studdy all the property she possessed before marriage
 " and since, such as clothes, trinkets, plate, pictures, etc. etc.,
 " which, however, revert to him at her death. Major Studdy
 " to allow Mrs. Studdy to reside where she pleases, and with
 " whom she pleases, and not to compel her to live with him
 " again, or to go near her or molest her in any way; and Mrs.
 " Studdy promises that, if she does not fulfil her part of the
 " agreement, Major Studdy shall have the full power of a
 " husband over her, whatever his way of living may be.—Mar-

"garet Studdy. T. B. Studdy. October 13, 1857. Witnessed by—Thos. Michelmores. Robt. Farwell." And it was proved that the paper was signed in the presence of two witnesses, and that the petitioner then stated that she signed it of her own free will. No evidence was given of any act of adultery committed by the respondent in 1855 being made known to the petitioner; but evidence was given that after the separation the respondent cohabited with Jane Hodges at Plymouth, where they passed as man and wife, and that this had been recently discovered and made known to the petitioner.

The case, therefore, depends entirely upon the meaning to be ascribed to the paper signed by the parties: if the wife thereby gave leave to her husband to commit adultery in future, that would satisfy me that she condoned any such acts previously committed; if she did not give any such leave, then any condonation of previous acts is immaterial, for that would not deprive her of the right to proceed in respect of her husband's subsequent misconduct. The case of *Barker v. Barker*, 2 Add. 286, was relied on by the respondent, and upon that an argument was founded that the wife, by signing such a document, intended to give the license contended for; and that she was bound to rebut that presumption. But I am of opinion that I must decide this case upon the words of the document itself: even assuming that I could take into consideration surrounding circumstances had they existed, and construe it by their aid, none such were proved. The first part of the document gives a large license to the wife to reside where she pleases and with whom she pleases, but no one could say that such license extended to living with a paramour. Then follows a promise by the petitioner, that if she does not fulfil her part of the agreement (which related solely to giving up certain property, and not to any license given to her husband), he shall have the full power of a husband over her, whatever his way of living may be; it has no reference to time past, and cannot be read "whatever his way of living may have been," nor "whatever his way of living may henceforth be." If either of those readings could be adopted, I should think that it pointed at some course of conduct on his part which, but for the agreement, would have enabled her to resist

1858.
December 23.

STUDDY
v.
STUDDY.

1858. any attempt by him to exercise the authority of a husband ;
 December 23. but it seems to me that the words were intended to apply to
 the future ; to the time when he should be exercising the
 power of a husband, and I cannot suppose that she meant to
 give him a license to commit adultery when they should be
 living together, no such license having been given during the
 separation. A different meaning will be given to the words
 if they are construed to apply to the place where, and the
 mode in which, he may choose to live, with reference to his
 establishment—whether (*ex. gr.*) in a house or in lodgings,
 whether he keeps a permanent residence or wanders from
 place to place, and other matters of that nature ; it is there-
 fore unnecessary to resort to the supposition that the immo-
 ral contract contended for was contemplated in order to find
 some meaning for the words used.

STUDDY
 v.
 STUDDY.

This being the meaning that I ascribe to the words, I am
 of opinion that the respondent has failed to prove that the
 petitioner connived at the adultery committed by him since
 the separation, and that the petitioner is entitled to the de-
 cree which she prays.

Confirmed on appeal to the full Court (Lord *Campbell*,
 C. J., *Martin*, B., and *The Judge Ordinary*), on the 22nd of
 May, 1859.

(Before the JUDGE ORDINARY.)

December 22.

BOYNTON v. BOYNTON.

BOYNTON
 v.
 BOYNTON.

*Petition for Dissolution at Suit of Wife.—Interim Custody
 of Child.—20 & 21 Vict. c. 85, s. 35.*

In April, 1858, the wife left her husband's house, with the view of in-
 stituting a suit for dissolution of marriage, by reason of cruelty and
 adultery, taking with her their boy, between seven and eight years
 of age, whom she placed in a school kept by an intimate friend of her
 own. On application for an interim order, to prevent the father re-
 moving him from such school:

HELD, that the wife's intimate friend could not be considered an indif-
 ferent person between the parties.

The Court ordered the child to be given up to the husband's mother, who, from the letters, appeared to be on good terms with the daughter-in-law, and attached to the boy. 1858.
December 22.

BOYNTON
v.
BOYNTON.

This was a question as to the interim custody of a child, arising in a suit for dissolution of marriage, brought by the wife against her husband for cruelty and adultery. The husband (Captain Boynton), in his answer, denied both the cruelty and adultery charged in the petition. The marriage took place in 1849, and there was one son born in 1851; Mrs. Boynton left her husband's house in April, 1858, for the purpose of commencing the present suit, and took the boy with her, and placed him at school with a clergyman of the name of Manning, an intimate friend of her own. Captain Boynton had seen the boy there a few weeks since, and Mr. Manning had then undertaken that he should not be removed from his custody till after the 23rd of December. The application was for an interim order, to prevent the child being removed by the father.

On the part of the husband, his mother, Lady Boynton, was suggested as a fit person to have charge of the boy.

Dr. Addams, Q.C., contra.

THE JUDGE ORDINARY: These are difficult and embarrassing questions, the ultimate order much more so than the interim order, which may be varied. If Mr. Manning's school had been selected for the boy, under the authority of the father, before the separation of the husband and wife, I should have ordered the boy to remain in his care. But that is not so. Mrs. Boynton left her husband's house, and without his sanction placed the boy in Mr. Manning's custody. Considering the terms of friendship which appear to subsist between Mr. Manning and Mrs. Boynton, I cannot look upon Mr. Manning as a person indifferent between the parties to this suit, and the husband may be right in wishing to remove him. On the other hand, as Lady Boynton's letters show a very kind feeling on her part towards Mrs. Boynton, and great attachment to the child, she would seem to be the most proper person to be entrusted with his custody. "Order the child "to be delivered up to Lady Boynton or to some person, other

1858. "than her son, deputed by her, Lady Boynton and Captain
 December 22. "Boynton both undertaking not to remove him till further
 ——— "order be made in the matter; the mother to have access at
 BOYNTON "all reasonable times."
 v.
 BOYNTON.

December 23.

(*Before the JUDGE ORDINARY.*)

BROOKES
 v.

BROOKES v. BROOKES.

BROOKES.

*Petition for Separation.—Desertion by Husband.—Offer to
 return before 20 & 21 Vict. c. 85 came into operation.*

A husband deserted his wife without cause in 1833. In 1850 he personally proposed to the wife to renew cohabitation, which she refused; in 1858 she petitioned for a judicial separation, under the 16th section of the Divorce Act, by reason of his wilful desertion.

Held, that no remedy having accrued to the wife in 1850 under the then state of the law, the offer of the husband in that year terminated the desertion, and that the petition must be dismissed.

This was a petition for judicial separation at the suit of the wife by reason of the husband's desertion. The husband was a bootmaker in Birmingham; the desertion commenced as long ago as 1833, but it appeared at the hearing, that about the year 1850 the husband had personally requested Mrs. Brookes, to return to him, which she refused to do. This raised the question whether, no remedy having accrued to Mrs. Brookes, as the law then stood, in 1850, the request made by the husband had not put an end to the desertion. (See *Cargill v. Cargill*, 1 Swab. & Tris. 235.)

Dr. Wambey appeared for the petitioner. *Cur. adv. vult.*

THE JUDGE ORDINARY: This was a petition by the wife for a decree of judicial separation, on the ground of desertion without cause for two years and upwards.

The evidence proved that the parties were married in 1823. The husband behaved extremely ill, and left his wife on several occasions. In 1833 he left for the last time, and they have never lived together since; but eight years ago he went to the petitioner and proposed that they should live together

again, which she refused; and the question is, whether she is, under such circumstances, entitled to a decree.

1858.

December 23.

The question depends upon the construction to be put upon the 16th section of 20 & 21 Vict. c. 85:—"A sentence of "judicial separation (which shall have the effect of a divorce "*à mensâ et thoro* under the existing law, and such other "legal effects as herein mentioned) may be obtained either "by the husband or the wife on the ground of adultery, or "cruelty, or desertion without cause for two years and upwards."

BROOKES

v.

BROOKES.

For the wife it was contended that the husband having deserted her in 1833, and having never offered to return to live with her till 1850, she was not then bound to receive him, and may now proceed for such desertion. If he had not offered to return until after the Act passed, so that when the offer was made the law had given her a right to petition, I think he could not have deprived her of that right by returning or offering to return. But the right to petition for judicial separation on the ground of desertion was first given by this Act. Desertion was not an offence previously known to the ecclesiastical or common law of the land. In that respect it differs from adultery and cruelty, the two other grounds for judicial separation mentioned in the same section. If a husband was guilty of either of those offences, the wife had a remedy in the Ecclesiastical Court, and the jurisdiction of that Court having been transferred to the Court for Divorce, it may take cognizance of those matters. But until this Act passed, desertion not being an offence cognizable by the Ecclesiastical Courts, no right to proceed for it could be transferred. Is then the clause to have a retrospective operation, so as to make that act an offence now, which was not an offence when it was done? So to construe it would give it another effect, which could hardly have been contemplated: at any time after the wife refused to return to cohabitation, the husband might have sued for restitution of conjugal rights, notwithstanding his long absence; but if the statute were to have a retrospective operation, it would take away a right to that remedy already vested. It may be that in this case the wife would have another and different defence to such a suit; but that does not alter the argument. It seems to me that, as no

1858. offence against the wife cognizable by the ecclesiastical law
 December 23. had been committed by desertion before the Act passed, and
 there has been nothing which can be called desertion since it
 ———
 BROOKES passed, the petition cannot be supported, and must be dis-
 v. missed.
 BROOKES.

1859. (*Before the Full Court*,—LORD CAMPBELL, C.J., MARTIN, B., and
 January 8 and May 20. the JUDGE ORDINARY.)

EVANS v. EVANS AND ROBINSON.

EVANS
 v.
 EVANS AND ROBINSON. *Decree for Dissolution.—Co-respondent.—Costs.—Practice.—*
20 & 21 Vict. c. 85, s. 34.

On application to the full Court for a decree of dissolution on the verdict of a jury, the marriage must be proved if it was not put in evidence at the trial before the jury. Generally, where the husband's petition is opposed, and the verdict and decree are in his favour, the co-respondent will be condemned in the whole costs of the proceeding. Where the wife's taxed costs up to the trial, and a sum of money to meet her further expenses had been paid into Court by the husband before the trial was allowed to proceed, the Court, after decreeing dissolution, and on motion that such sum should be at once paid out to the husband, directed such sum to remain in Court till the whole costs should be taxed; and on subsequent application for payment of the wife's taxed costs, directed such costs to be satisfied out of the sum of money to be paid into Court.

This was a petition for dissolution of marriage, at the suit of the husband, by reason of the wife's adultery. The adultery had been put in issue, and the answer also pleaded desertion, on which issue was taken. On these issues the case was tried before Martin, B., and a special jury, who found a verdict on both points for the petitioner.

Mr. Huddleston, Q.C. (with him *Mr. H. Hawkins* and *Mr. W. G. Harrison*), now moved the Court to decree a dissolution of the marriage.

LORD CAMPBELL: That involves a question as to whether the marriage was proved. Before this Court can make such

a decree, it must see most positive and direct evidence of everything that entitles a party to their prayer.

· 1859.
January 8 and
May 20.

MARTIN, B. : On reference to my notes, I see the marriage was proved at the trial by the evidence of Mr. Bagshawe.

EVANS
v.
EVANS AND
ROBINSON.

Whereupon the Court decreed the dissolution as prayed.

Mr. Huddleston then applied for costs against Robinson, the co-respondent. By the 34th section of the Divorce Act, wherever the alleged adulterer shall have been made a co-respondent, and the adultery shall have been established, it shall be lawful for the Court to order the adulterer to pay the whole or any part of the costs of the proceedings. In the present case, Robinson states that a verdict was returned in his favour in the first action for crim. con. brought against him ; that in the second action the verdict was against him, and that he paid £500 damages and costs. Proceedings were then taken against Mrs. Evans in the Arches Court for a divorce *à mensâ et thoro*, on which Mr. Robinson was examined as a witness. That suit was dismissed, and Robinson was indicted for perjury on account of his evidence given in the Arches Court ; when the jury could not agree on their verdict, and were accordingly discharged. When the Divorce Act came into operation, Mr. Evans brought his petition in this Court, where Robinson appeared and was heard by his counsel, though he examined no witnesses.

Serj. Pigott (*Mr. Hodgson* with him), *contra* : The Court has a discretionary power under the section referred to. In this case, Robinson has already paid damages and the costs of one action. (*Ling v. Ling and Croker*, 1 Swab. & Tris. 187.)

LORD CAMPBELL : I am clearly of opinion that we are bound to say the costs of the proceedings in this Court should be paid by Robinson. *Ling v. Ling and Croker* is no precedent in this case. We do not now intend to lay down any inflexible rule upon this point ; generally costs of these proceedings should be paid by the adulterer, but there may be in some cases peculiar circumstances to induce the Court,

1859.
January 8 and
May 20.
—
EVANS
v.
EVANS AND
ROBINSON.

in the exercise of its discretion, to order otherwise. The present case, however, seems to be one of great aggravation, holding definitely, as we are bound to do, that Mr. Robinson committed adultery with Mrs. Evans.

MARTIN, B.: I am of the same opinion. This is not an application for a penalty, but merely to indemnify Mr. Evans for the costs he has been put to by these proceedings, and I think he is entitled to be indemnified as far as it is in our power.

THE JUDGE ORDINARY: I am of the same opinion. Unless there are circumstances to make an exception, I think the co-respondent ought to be called upon to pay the costs; it was, I presume, one of the benefits intended by the Legislature to make the adulterer amenable to costs. It has been suggested on behalf of the co-respondent, that he called no witnesses in his favour, but Mrs. Evans did, and their defence was precisely the same; if that were allowed to be a ground for exercising our discretion, witnesses would always be called by the wife, and never by the co-respondent. For the purpose of deciding this question we must take it that he did commit adultery, and must therefore have known it.

Mr. Huddleston then moved that £76, the amount of Mrs. Evans's taxed costs up to the trial, and a further sum of £700, paid by Mr. Evans into Court to meet Mrs. Evans's further costs before the trial was allowed to proceed, should now be directed to be returned to Mr. Evans. The question is, whether Mrs. Evans's proctor is to take this sum of money, or to repay it to Mr. Evans and go against Mr. Robinson for their costs.

By the COURT: Let the money remain in Court till the costs are taxed; and this motion may stand over.¹

¹ The summonses and orders thereupon in respect to the above sums of moneys were in the following terms:—

"Let the petitioner's solicitor, etc., attend Sir C. Cresswell, Knight, "on Saturday next, the 3rd day of July, at twelve of the clock at "noon, to show cause why the costs of the respondent's proctors in

On May 20th, *Dr. Deane*, Q.C., moved the Court to direct the respondent's taxed costs to be satisfied out of the sum of money paid into Court.

1859.

May 20.

EVANS

v.

EVANS AND
ROBINSON.

LORD CAMPBELL, C.J.: The wife's proctor has a lien on the sum.

Mr. Huddleston, Q.C., *contra*: The decree of the Court condemned the co-respondent in the whole of the costs; the petitioner's costs were taxed at about £1200, and we cannot get even those from the co-respondent. During the year in which the trial was pending, Mr. Evans, without any order of the Court, paid £250 towards Mrs. Evans's costs.

LORD CAMPBELL, C.J.: The respondent's costs have been

"this cause should not be taxed, and the amount, as taxed, be paid by the petitioner, or his solicitor or agent, to the said proctors, on or before the first day of August next.

"1st July, 1858."

"A. F. BAYFORD, Registrar."

"Upon hearing the agents for both parties, I do order that the respondent's costs be taxed by the registrar.

"July 17, 1858."

"C. CRESSWELL."

"Let the petitioner, etc., attend Sir C. Cresswell, at Westminster, on Wednesday next, the 24th Nov., at eleven o'clock in the forenoon, to show cause why the sum of £73. 6s. 10d., the amount at which the costs of the respondent, in pursuance of the order of the Right Hon. the Judge, of the 17th July last, have been taxed, should not be paid by the petitioner to the solicitors of the said M. S. Evans, on or before the 26th Nov. inst., and to show cause why the further costs of the respondent up to the hearing should not be taxed previously thereto, and why the amount thereof as taxed, as also the expenses of the briefs and expenses of counsel disallowed by the registrar in pursuance of the directions of the Judge, on the 17th July last, should not be paid by the said A. L. Evans to the said solicitors previously to the hearing of this cause.

"Nov. 20, 1858."

"H. L. STRONG, Registrar."

"Upon hearing the agents for all parties, I do order that before the hearing of this cause the costs already taxed to be paid to the respondent or her proctor, and that a sum of money be paid by the petitioner into Court, or that (if the registrar think fit) he should give security for defraying the necessary expenses on the part of the respondent bringing her case before the full Court for trial.

"Dated Dec. 2, 1858."

"C. CRESSWELL."

1859.
May 20.

EVANS
v.
EVANS AND
ROBINSON.

taxed; we cannot now reopen that question. An order must be made for payment of that sum, and costs of the present application.

THE JUDGE ORDINARY: I directed the respondent's costs to be rigidly taxed; and the costs of this application are made necessary by your parties refusing to take my orders in chambers.

January 17.

SEYMOUR
v.
SEYMOUR.

(Before the JUDGE ORDINARY.)

SEYMOUR v. SEYMOUR.

*Judicial Separation.—Desertion.—Permanent Custody of
Children.—Practice.*

A. deserted his wife and went to Australia in March, 1854; in 1858 the wife filed a petition for judicial separation by reason of desertion; the husband was personally served, but gave no appearance. The Court pronounced for the judicial separation, but refused to make any order for the custody of children. It seemed unnecessary, as they were now in the mother's custody, and the father in Australia. *SEMPLE*, when permanent custody is intended to be asked for, it should be inserted in the prayer of the petition.

This was a petition at the suit of the wife for judicial separation, by reason of her husband's desertion. It was proved that the husband, who had been doing a good business in London as a goldbeater, in March, 1854, sold off his stock and went to Australia, refusing to take his wife with him or to allow her to be sent out after him. He wrote to his wife in March, 1854, according to her evidence, a most insolent letter, and she did not hear from him again until after the petition was filed, when she received from him a most disgraceful letter. The wife wrote to him till September, 1855, and sent him a letter in December, 1857.

There were six children of the marriage, four boys and two girls, varying from sixteen to five years of age—the youngest, a boy, having been born after his father went to Australia.

Personal service had been effected on the respondent, but he gave no appearance.

1859.

January 17.

Upon the decree for judicial separation being pronounced, counsel for the petitioner prayed the Court to make an order for the custody of the children.

SEYMOUR
v.
SEYMOUR.

THE JUDGE ORDINARY: I feel great difficulty in making any order as to custody of children in such a case. In the first place, the application is not embodied in the prayer of the petition, so that the husband has had no notice that it is to be made; secondly, I cannot see that any such order is called for in the present instance. The children are in the mother's custody, and the husband in Australia, and not very likely to interfere with them.

Decree judicial separation, but make no order as to custody of children.

(Before the JUDGE ORDINARY, on motion.)

January 17.

HAYWARD v. HAYWARD.

HAYWARD
v.
HAYWARD.

Suit for Restitution.—Compromise by Counsel.—Practice.

So long as the suit remains on the Court book, the Court cannot consider as binding any agreement to compromise made by counsel of parties to a matrimonial suit, but is bound to hear such suit, if either party desires it, after such agreement made.

QUÆRE, whether this Court can sanction or consider as binding any agreement for a husband and wife to live apart?

This was a suit for restitution of conjugal rights, brought by the wife. The pleadings disclosed some very peculiar circumstances (*Hayward v. Hayward*, ante, p. 81). The case was set down for hearing before the Judge Ordinary in the sittings after Trinity Term, 1858; but the leading counsel on either side having with the assent of both parties to the suit agreed to a compromise, it did not proceed. Mrs. Hayward was dissatisfied with the arrangement, and subsequently repudiated it, on the ground that when she assented to it she had been taken by surprise.

1859. *Dr. Waddilove* moved the Court to allow the case to be
January 17. heard.

HAYWARD
v.
HAYWARD.

Mr. Slade, Q.C., *contra*, contended that Mrs. Hayward was bound by her counsel's arrangement.

THE JUDGE ORDINARY: I think whatever arrangement may have been made between the parties, as the cause is still on the books and the petition has not been dismissed, I ought to hear it. I much doubt, however, whether this Court can sanction or consider as binding any agreement between the parties to live asunder. Although such an agreement would be recognized at law or in equity, it would not have been recognized in the Ecclesiastical Courts.

1858. (*Before the JUDGE ORDINARY and a Special Jury, and before the Full*
Dec. 13 & 14. *Court (LORD CHELMSFORD, C., WIGHTMAN, J., and the JUDGE*
And *ORDINARY), on motions for decree and new trial.*)
1859.

Feb. 1, 4, & 5.

KEATS v. KEATS AND MONTEZUMA.

KEATS
v.
KEATS AND
MONTEZUMA.

Dissolution of Marriage. — Condonation. — Evidence. — Damages. — Wife's Costs. — Annuity to Wife. — 20 & 21 Vict. c. 85, ss. 32, 33.

A wife was charged in a petition with adultery, to which she pleaded condonation; counsel for the husband, in order to repel this plea, by showing that at the time of the alleged condonation the husband was not cognizant of the whole of the wife's adultery, tendered evidence of acts of adultery not laid in the petition, and which were committed prior to, but were unknown to the husband at the time of the alleged condonation; the Judge Ordinary ruled, *hesitanter*, that, as the petition contained no averment of the acts of adultery, the evidence was inadmissible.

There can be no condonation, by the law of England, which is not followed by conjugal cohabitation.

QUÆRE, whether condonation may not be constituted *per verba*?

On a decree of dissolution of marriage by reason of the wife's adultery, she having under a marriage settlement the interest, after her husband's death, of £10,000, and a right to dispose of one-fifth of that sum, the Court directed the husband to secure her an annuity during his life of £150, *quamdiu casta vixerit*, on condition of her giving up

the right to dispose of the £2,000; and directed the damages assessed against the co-respondent to go, first, in payment of wife's costs; secondly, in payment of husband's, and thirdly, any surplus in satisfaction of the annuity to wife.

The wife's costs will not be taxed against the husband after trial, when she has failed in her suit.

1858.
Dec. 13 & 14.
And
1859.
Feb. 1, 4, & 5.

KEATS

v.

KEATS AND
MONTEZUMA.

This was a petition for dissolution of marriage, filed by Frederick Keats against his wife, Esther Elizabeth Keats, on the ground of her adultery with the co-respondent, Don Pedro de Montezuma.

The petition, which was filed on the 22nd of May, 1858, pleaded the marriage of the petitioner with the respondent on the 11th of July, 1854; that the respondent had no property, but that the petitioner had by a settlement, executed in contemplation of their marriage, secured to the respondent in the event of her surviving him the income of £10,000 consols, during her life, with power, in default of issue of the marriage, to dispose by will, notwithstanding her coverture, of one-fifth part thereof; that there had been no issue of the marriage; that the respondent in the year 1858 committed adultery with the co-respondent, Don Pedro de Montezuma, in Ebury Street, at Dover, and in Dublin, and prayed that he might be condemned in damages and the costs of the suit.

The respondent appeared, and on the 18th of June, 1858, filed an answer denying the adultery. On the 6th of December, 1858, she filed a further answer, wherein she alleged that after the original answer to the said petition was filed, and before the said 6th day of December, 1858, the petitioner had condoned the adultery (if any) alleged in the said petition to have been committed by her.

The co-respondent also appeared, and filed an answer denying the adultery.

These issues were directed to be tried before the Judge Ordinary and a special jury.

Mr. Phinn, Q.C., Dr. Addams, Q.C., and Mr. Hardinge Giffard, for the petitioner.

Dr. Phillimore, Q.C., and Mr. Thring, for the respondent.

1858. *Mr. J. P. Murphy* for the co-respondent.
 Dec. 13 & 14.
 And
 1859.
 Feb. 1, 4, & 5.

—
 KEATS
 v.
 KEATS AND
 MONTEZUMA.

The important facts, as proved in evidence, were as follows. The petitioner was possessed of considerable property, and was also a partner in the firm of Fortnum and Mason, in Piccadilly. On the 11th of July, 1854, being a widower, and having three children—a son and two daughters—by his former wife, he intermarried with the respondent, then Miss Esther Elizabeth Marrett, a lady who was a native of and a resident in Jersey. At the time of their marriage she was thirty years of age, and the petitioner was about sixteen years her senior. She had no fortune, and on their marriage a sum of £10,000 consols was brought into settlement by Mr. Keats, limited to himself for life, with remainder to Mrs. Keats for life, with remainder to the issue of the marriage; and in default of issue, as to four-fifths of the principal sum, for Mr. Keats, his executors, administrators, and assigns; and as to the remaining one-fifth of the principal sum, upon and for such trusts, intents, and purposes as Mrs. Keats should, notwithstanding coverture, by will appoint; and in default of appointment, in trust for Mr. Keats, his executors, administrators, and assigns.

For some period after the marriage they appeared to have lived happily together, residing at Braziers, in Oxfordshire (Mr. Keats's country residence), and also at his house in town. In 1856, Mr. Keats entered upon the office of sheriff for London and Middlesex. In the summer of 1857, he made a short tour on the Continent, accompanied by Mrs. Keats and his children. During this tour they had several quarrels, and on three occasions Mr. Keats was said to have spoken of his wife as a whore; they would appear, however, from a letter which she wrote to him shortly after their return from the Continent, to have become subsequently reconciled. In September, 1857, they returned to England, and took up a temporary residence at Brighton. Here Mr. Keats became acquainted with the co-respondent, who was a Spaniard by birth, and was possessed of considerable musical talent; he invited him to his house, where the co-respondent soon became a frequent visitor; but his attention to Mrs. Keats having excited Mr. Keats's suspicions, led to further quarrels and altercations between them. In November, 1857, they left Brighton and went to reside in

Westbourne Terrace. Don Pedro continued his visits at Westbourne Terrace ; Mr. Keats remonstrated with him ; but a few days afterwards his suspicions, on some grounds not explained, were quieted, and he wrote to him on the 28th of November, 1858, expressing his regret for his rudeness towards him, on the Tuesday previous, and stating " that nothing was further " from his intentions than to give him pain after the numerous " pleasing attentions he had been kind enough to show him and " his family," and invited him to his table. Shortly afterwards his suspicions of his wife's infidelity were revived, which led to renewed altercations between them, and on two occasions, in consequence of differences with her, he left his house accompanied by his daughters, but on each occasion returned the following day. Negotiations for a separation were entered upon ; the sum of £500 was fixed as the allowance to be made by him to his wife ; a deed of separation was prepared and approved of by the solicitors of both parties (the selection of a trustee being the only part of the arrangement which was not completed), when on the 9th of January, 1858, Mrs. Keats, in consequence of a further quarrel, left the house and took lodgings, unknown to her husband, in Ebury Street, but afterwards wrote to him giving him her address. Here she was visited by Don Pedro, and on the 20th of the same month she went to the Lord Warden Hotel at Dover, where she took rooms for herself and maid, and also a room for Don Pedro. He visited her there ; and in about a fortnight they left and went together to Dublin, where they lived for about three months, always in the same house, but occupying separate bedrooms, and passing as brother and sister. Don Pedro then left Mrs. Keats, who went to live with her mother at St. Leonards.

Mrs. Keats's adultery with Don Pedro was admitted, and the only question raised was one of condonation. For the wife it was contended, that, by reason of certain expressions used by Mr. Keats in the course of an interview he had with her during the pendency of the suit in November, 1858, he had condoned the adultery, and it was urged, that feelings of remorse for previous harshness and unkindness towards her had prompted him to take this step. But the Judge Ordinary was of opinion, that the evidence failed to show that Mrs. Keats had been treated by her husband with unkind-

1858.
Dec. 13 & 14.
And
1859.
Feb. 1, 4, & 5.

—
KEATS
v.
KEATS AND
MONTEZUMA.

1858. ness or harshness previous to her intimacy with Don Pedro.
 Dec. 13 & 14. The important evidence in support of the plea of condonation
 And
 1859. was as follows :
 Feb. 1, 4. & 5. Miss Amelia Janvrin, the first material witness produced,
 was an aunt of Mrs. Keats, and had had a correspondence
 with Mr. Keats on the subject of an arrangement. It was
 opened by Mr. Keats himself in the following letter :—

—
 KEATS
 v.
 KEATS AND
 MONTEZUMA.

“ Inverness Terrace, October 14, 1858.

“ My dear Madam,

“ It is now a very long time since I addressed you, but hearing that you have recently had an addition to your family, I conceived I might take the opportunity of congratulating you on the happy event that has occurred. As you were the first person who informed me of the deception practised on my credulity by Mrs. Keats, I now apply to know if that lady is in Jersey or in England. I have heard various rumours, but I am quite at a loss to know what has become of her ; and although it would be quite impossible for us to meet again, yet sooner than she should become an object of poverty, the scoundrel with whom she eloped having left her, I should be glad to see some member of the family to confer with on this sad and disgraceful elopement, which is as lowering and detrimental to all the members of a respectable family as well can be conceived. Would you kindly, as you have always shown great interest in Esther's affairs, communicate with me direct on the subject, but strictly confidentially. For myself, I do not wish for law, but would greatly desire that an understanding might be come to finally, to avoid further litigation. The law would entitle me to a divorce, but the exposure must be great and withering to all parties. Pray think of this and write me a confidential letter. Very sincerely yours,

“ FRED. KEATS.”

To which Miss Janvrin wrote in answer :—

“ October 17, 1858.

“ Dear Sir,

“ I received your letter yesterday, and hasten to acknowledge it, and to say I will with pleasure do anything in my power to promote a reconciliation, though the task is difficult. In the first place, I do not understand that part of your letter, in which you say, ‘ As you were the first person who

informed me of the deception practised on my credulity by Mrs. Keats, I now apply to know whether that lady is in Jersey or in England.' Feeling unconscious of having blamed Esther in any way, and having a copy of the letter I wrote to you, I venture to say that I shall overlook that as coming from an angry feeling whilst writing. Dear Esther is in England, living with a respectable widow lady; her mother is with her, and she tells us her health is greatly improved. I shall ask her leave to give you her direction, for, alas! poor thing, she has been sorely tried,—I mean from great worldly society to complete retirement. As to the grief of inward feelings, she has not once uttered; Christian fortitude has prompted her to bear in silence, and when driven to despair through the neglect of one who promised to cherish till death, she has chosen a quiet home, and, with a light conscience, her health is improving. Allow me to lay before you, that considering you were so much older, and having an unprincipled governess, hinting evil into your ears, you must reflect and be thankful to the Almighty that she, who was young and with little experience, had not been driven to madness. Allow me to say also, Mr. Keats, that the moment you left her, for weeks together, alone in lodgings, without money, she of course was compelled to accept the needful assistance. Pray do assure her of your ill-adviser; and in a frank and open acknowledgment prove the whole affair of troubles false. The whole tenour of your letter indicates love towards her you have plighted your troth to; and may those sacred words, 'Those whom God has joined together, let no man put asunder,' be with you in our earnest prayer. My dear mother's health has been much shaken by this trial; but I am thankful to say she seems picking up now. She sincerely hopes matters will be agreeably settled," etc.

To this letter Mr. Keats sent the following reply :

" October 19, 1858.

" My dear Miss Janvrin,

" The receipt of your considerate letter reached me this morning on my return to London, having been some few days at Braziers, etc. In a letter it is hardly possible for me to convey to you the unjustifiable means that were resorted to to injure me and my character and that of your niece, Mrs.

1858.
Dec. 13 & 14.
And
1859.
Feb. 1, 4, & 5.

—
KEATS
v.
KEATS AND
MONTEZUMA.

1858. Esther Keats. It would be almost impossible to conceive that
 Dec. 13 & 14. a female in the responsible situation you mention could pos-
 And sibly have indulged in such methodical, combined wilfulness
 1859. with family intrigue. That cold, calm, pretended, calculating
 Feb. 1, 4, & 5. smile put on to snare the victim, who unfortunately employed
 ——— and gave her a home. I do not hesitate to say, that I have
 KEATS discovered the deceit. She has left my service, but I much
 v. fear is still in England. What I alluded to in my letter to
 KEATS AND you was one that was forwarded to me when Esther first left
 MONTEZUMA. her home, and from the tone of which I admit I was highly
 incensed. I inclose you the copy. You must understand
 that before Mrs. Keats left her home to go, as I understood,
 to Jersey, on a visit to yourself, we had some words about
 my children, and my wife was induced by some bad adviser,
 who I cannot now mention, to take the unjustifiable course
 she did; but the fact of deliberately asking a separate
 maintenance for herself after the liberal manner I had
 treated her during the whole year of shrievalty, did, I
 admit, wound my feelings, and convinced me she was the
 dupe of some heartless villain. But I will say no more.
 I inclose you the copy of the note received just as I made
 it when I received it months ago, the original being in
 the hands of counsel. From this you will immediately
 perceive that such indirect influence has been used, and pro-
 bably still is continued even at the present moment. After
 what has passed, and the position I have taken as plaintiff,
 under the advice of my family, I cannot help it, but shall be
 most happy to meet yourself or one of your family relative to
 this distressing event for all parties. More than this I cannot
 say,—more than this at the present time I dare not do.
 Trusting I may have another letter from you shortly," etc.

To this Miss Janvrin replied that she sees that it is impos-
 sible to settle the matter through post, and proposes to come
 over to England. Mr. Keats, in answer, offered to receive her
 in his own house, and said, "As matters stand we must be very
 careful, as we are watched, but there can be no harm in my
 seeing Esther's best friend as to an amicable arrangement
 without law."

The following letter from Mrs. Marrett (Mrs. Keats's
 mother) was also put in evidence.

" October 27, 1858.

1858.

Dec. 13 & 14.

And

1859.

Feb. 1, 4, & 5.

KEATS

KEATS AND
MONTEZUMA.

" Dear Mr. Keats,

" Having heard the contents of your letter to my sister Amelia of the 4th instant, and your reply to her answer, I am now stopping with Esther, with the natural desire to soothe her wounded feelings caused by unjust and unfounded accusations, which have been made by you on suspicion only. I quite agree with you that the exposure of this law business, whatever the result may be, will be dreadful to all parties, and should by all means be avoided. It would certainly not be for the happiness of either of you that Esther should ever again reside with you, and, using your own words, would be quite impossible. So long as I live she can be under my protection, but you must remember that she is still your wife, and you must make her such a provision as is necessary for her due maintenance. Esther has received your message; she is willing to come to some arrangement if you will make her an allowance. Sincerely hoping that matters may soon be arranged. Believe me," etc.

There was an answer from Mr. Keats, dated October the 30th.

" My dear Mrs. Marrett,

" I received your letter of the 27th instant yesterday the 30th, as I was from home when it arrived. I hasten to say I shall be most happy to communicate with you relative to the disagreeable and vexatious exposure to all parties concerned, relating to the mutual separation between myself and your daughter, my wife Esther E. Keats. I do not hesitate to state she has been the dupe of the most outrageous family plot that probably ever was exposed, and it is most satisfactory to me that men of such high character as Mr. Bircham, her trustee, in this most disgraceful attempt at deceit should be her guardian. I know very little of the individual who has undertaken these law proceedings and instituted the suit for a divorce contrary to my wish.

" From the tenour of your letter, I presume Miss Janvrin will not come to London. As you, as your daughter's natural protector, will be sufficient, it is my most painful duty to inform you that a great deal of this deception emanated from Barnes, where unfortunately Esther lived so long. I am living at Braziers, where you can communicate with me. Be-

1858. lieve me, etc. Pray give Esther my sincere regards for her
Dec. 13 & 14. welfare.

And

1859.

Feb. 1, 4, & 5.

KEATS

v.

KEATS AND
MONTEZUMA.

"F. KEATS."

Miss Janvrin came over to England; Mr. Keats met her in town, and agreed to go down with her to St. Leonards to see his wife: this was on the 2nd of November; but he first went with Miss Janvrin to his solicitor, Mr. Guy. On their way there, *he said he had feelings for his wife, and he loved her, and if he could get this matter over, he should be happy. He thought they might be happy, because Esther had no children.* The result of the interview with Mr. Guy was, that he did not go to St. Leonards; and on the 5th of November he wrote as follows to Miss Janvrin: "After the evidence I have heard this afternoon, it will be quite impossible for me to see or communicate with Mrs. Esther E. Keats, and I very much regret you should have come to England on this business. I can do nothing more in the matter than refer you to Mr. Guy, my solicitor in Sir C. Cresswell's Court."

Subsequently to this, Mr. Keats communicated by letter with Mr. De Brisay, a brother-in-law of his wife, and a clergyman of the Church of England, in which he referred to having had further most unpleasant disclosures respecting Mrs. Keats, but stating that he should be very happy to meet him and talk over the unfortunate affair, and should wish to settle the matter quietly for his own sake and the children's.

This resulted in Mr. De Brisay, on the 27th of November, driving up with his wife and Mrs. Keats to Mr. Keats's house. Mr. De Brisay's account of what occurred is as follows:

He, Mr. De Brisay, at first went into the house alone, and on entering into conversation upon the subject, Mr. Keats began by saying he was the victim of a foul conspiracy, and that all his relations were in league against him, and were all wishing to deprive him of the custody of his children. He then began by abusing his partners, and said he had been brought into this matter without his own wish or consent, and that his lawyer had pressed him on a great deal beyond what he himself had intended to have gone. He then stated he would be very glad if he could settle the matter quietly. Mr. De Brisay urged him to do so, both for his own sake and for his children; he said he

dreaded the exposure very much; and that two persons were at the bottom of it all. Mr. De Brisay asked him what were his own feelings with regard to his wife—whether he really thought she had so much wronged him; he replied that the evidence was very painful, but that he should like some explanation. He then began asking him for some explanations, to which Mr. De Brisay said, that if he wished for an explanation, the best way would be to see his wife. To this Mr. Keats at first made no direct answer, but subsequently stated he should like to see her in the presence of some third party. He also stated that he should like to see Mrs. De Brisay. Upon being told by Mr. De Brisay that she was at the door in the carriage, he went out to bring her in, and then saw Mrs. Keats. Mr. Keats brought Mrs. De Brisay into his house, and Mr. De Brisay followed with Mrs. Keats. After a pause, Mrs. Keats asked her husband whether he did not intend to speak to her. He said, “Well, Esther, I have not seen you for so long, I don’t know what to say.” He then asked her where she had been living, and about her debts. Mr. De Brisay continued, I told Mr. Keats that our only object was to make friends. He said it was his most anxious desire. He then asked us if we would have some luncheon. Whilst it was being got ready, he turned to his wife and said, “Would n’t you like to see the drawing-room?” We all went upstairs and saw it. He noticed several things in the room to her. We came down to lunch, and he made several remarks to her about the furniture. I then pressed upon him, as he was so anxious to settle the matter quietly, he should write a note to Mr. Guy. He said he would see him, and proposed that we should go together. We accordingly all went together, and saw the clerk only. Mr. Keats told the clerk that he wished the matter to be settled quietly. The clerk said it was far too important a matter for him to deal with. It was arranged that I should go back to Mr. Guy’s on the following Monday. Mr. Keats turned to his wife whilst driving in the carriage with her, and shook her twice by the hand, and said, “Well, my dear, we shall understand one another better, and we must not revert to the past.” She said, “Will you come and see me at St. Leonards?” He replied, “The matter is so nearly on the eve

1858.

Dec. 13 & 14.

And

1859.

Feb. 1, 4, & 5.

KEATS

v.

KEATS AND
MONTEZUMA.

1858. "of being settled, that I will not come now, but I will after-
 Dec. 13 & 14. "wards." I then said to him, "Then we will go to Mr. Guy's
 And
 1859. "on the Monday morning, on the distinct understanding that
 Feb. 1, 4, & 5. "you tell him you have seen your wife, and that you wish the
 "matter to be quietly settled, and have forgiven her." He said,
 "Yes." He then turned to me and said, "I thank you very
 "much for what you have done today. I have expressed very
 "fully to you my real feelings." On the Monday morning,
 Mr. De Brisay and Mr. Keats met at Mr. Guy's office, when
 Mr. Guy persuaded Mr. Keats to go on with the suit. On
 cross-examination, Mr. De Brisay admitted that he and his
 wife brought Mrs. Keats to her husband's house, with the
 view, if possible, of getting her admitted into the house, and
 that before Mr. Keats went out to the carriage to bring
 Mrs. De Brisay into the house, he did not tell him that he
 would see his own wife with her. That they were about
 three hours in the house altogether, and that Mr. Keats had
 asked his wife whether she had seen Don Pedro since she had
 been in Dublin, and that she said, "No."

KEATS
 v.
 KEATS AND
 MONTEZUMA.

Mr. Phinn now proposed to call a witness to prove that Mrs. Keats had committed adultery with Don Pedro since she had left Dublin. It was laid down in *Snow v. Snow*, 2 Notes of Cases, Supp. p. 1, "that there was no condonation where "the whole of the adultery was not known to the party."

Dr. Phillimore, contra: There is no averment in the petition of Mrs. Keats having committed adultery with Don Pedro after she left Dublin. He submitted that it was not competent to the petitioner to give evidence of adultery not laid in the petition.

THE JUDGE ORDINARY: The exact position of the parties is this: there is a petition in which the petitioner alleges certain acts of adultery against his wife, in respect of which he claims a divorce. Dr. Phillimore, for the wife, says, that the offence laid in the petition has been condoned, and has given evidence for the purpose of establishing that point. Mr. Phinn, on the other hand, admitting that there is evidence to be laid before the jury that the petitioner, with the

knowledge of certain facts, has condoned the acts of adultery laid in the petition, yet says that, inasmuch as the Ecclesiastical Courts have always held that unless the party aggrieved knew all his condonation would go for nothing, he is entitled to prove other acts of adultery, which were not at the time of the alleged condonation known to the petitioner, and of which he has not complained in the petition. What was the practice of the Ecclesiastical Court? Would that evidence of condonation be disposed of by evidence of additional adultery?

1858.
Dec. 13 & 14.
And
1859.
Feb. 1, 4, & 5.

KEATS
v.
KEATS AND
MONTEZUMA.

Dr. Phillimore : Evidence of additional adultery would have been inadmissible unless it had been pleaded.

THE JUDGE ORDINARY : I think that Mr. Phinn might urge this : that the respondent must be taken to know the full meaning of the word condonation ; that the petitioner had condoned knowing everything ; and that she must be prepared to show that he had full knowledge of everything. It is a very difficult question. My impression is rather in favour of Dr. Phillimore's objection. If I am in error in shutting out this evidence, and the jury make it necessary to inquire further, the Court will have an opportunity of correcting it. If I am in error in admitting it, though it is possible that it might have an effect on the verdict, it is also possible that the verdict might have been the same without it. Though I have great doubts upon the point, I will reject the evidence. Dr. Phillimore says that no evidence of adultery not alleged in the petition is to be admitted. I rule this *hesitanter*.

THE JUDGE ORDINARY, in charging the jury on the question of condonation, said : the question you have to try is that of condonation. Mrs. Keats no longer says, "I am not an adultress," but she says, "You have condoned the adultery with which I am charged." Now until this Court was established, a question of this nature was left to the decision of a single judge in the Ecclesiastical Court, and he, having the whole matter before him, compared in his own mind the law with the facts, and formed his opinion thereon, as to whether condonation was established or not. The Legislature has thought fit that questions of fact should in such cases

1858. now be determined by a jury, and it is therefore necessary to
 Dec. 13 & 14. separate the consideration of the law from that of the facts.
 And
 1859. I have not been able to find in the Reports of cases decided in
 Feb. 1, 4, & 5. the Ecclesiastical Courts, any precise definition of what was
 meant in those Courts by the word "condonation;" but look-
 ing to the circumstances under which former judges have
 held condonation to have been established, I have come to
 the conclusion that condonation means a "*blotting out of*
"the offence imputed, so as to restore the offending party to
"the same position he or she occupied before the offence was
"committed." This is the best definition that I can give you
 of the term of condonation.

KEATS
 v.
 KEATS AND
 MONTEZUMA.

The term "*forgiveness*," as it is commonly current in the English language, does not fully express the meaning of "condonation." A party may "forgive" in the sense of not meaning to bear illwill, or not seeking to punish, without at all meaning to restore to the original position. If you have a clerk or a servant who has robbed you, you might forgive him, and say, "I forgive you," without having the slightest intention of replacing him in your service, or of restoring him to the position he had forfeited. I take it, "condonation" would mean more than this; to use the language of Lord Stowell, it is like releasing a debt; it makes the debt as if it had never existed.

Again, it has been held that the person condoning, in order to condone, must know of the offence, otherwise he cannot be supposed to have condoned it. That perhaps is not strictly applicable in all cases, because a man may condone whether he knows of the offence or not, in this way: he may say, "I have heard stories about my wife. A. and B. have told me she has committed adultery. I can hardly believe it. I am in doubt about it; but whether guilty or not, I will take her back; she shall be restored to my bed." That would be a condonation without actual knowledge; and I think if after this he took her to his bed again, he could not afterwards, on acquiring more certain knowledge, revive the charge, as to which he had himself said, "I care not whether it is true or false; I do not know whether it is true or not; but be it one or be it the other, I would equally take her back to my bed."

Again, where a man has had information of the guilt of his wife, he is presumed to know of her guilt, and if he does that which demonstrates condonation, under such circumstances he is presumed to condone with knowledge of the guilt. But it may be that a man has knowledge, that he has information, but his intellect is obtuse. Generally speaking, you assume a man to know and to believe that which a reasonable man would believe under such circumstances. This is a safe presumption, but the contrary may be proved. If a man write a letter to A. B., and says he has seen his wife commit adultery, which is positive information, a man of ordinary capacity may say, "I believe the evidence, and I condone the offence;" and a man of less firm mind may be operated upon by argument or insinuation, so as to ascribe the information he has received to some evil motive, or to some plot on the part of the informant, and so, although he has the information, he may not believe it, and therefore, in taking his wife back, he may not intend condonation.

Again, condonation in this case is by word of mouth only. In the Reports of decisions in the Ecclesiastical Courts, there is no case precisely in point with the present one. In almost all of them, the great proof of condonation was the recommencement of matrimonial cohabitation, or some act done; and if the husband, knowing that his wife has been guilty of adultery, takes her to his bed again, he being clearly his own master in that particular, and quite able to choose for himself, if he is so regardless of the wrong done to him as to take her back again, it is always held that this is such a proof of condonation that it cannot be got over. With reference to a wife, to whom a knowledge of her husband's adultery has been brought home, and who has yet continued to share his bed, the rule has not been so strict. The wife is hardly her own mistress; she may not have the option of going away; she may have no place to go to; no person to receive her; no funds to support her; and therefore her submission to the embraces of her husband is not considered by any means such strong proof of condonation as the act of the husband in renewing his intercourse with his wife.

I do not mean to say that condonation may not be by words, because if my view of condonation be right, the act of

1858.
Dec. 13 & 14.
And
1859.
Feb. 1, 4, & 5.

KEATS
v.
KEATS AND
MONTEZUMA.

1858. the person condoning intending by that condonation to
 Dec. 13 & 14. restore the offending party to her original position, may be
 And
 1859. manifested by words. Certain acts are sufficient in them-
 Feb. 1, 4, & 5. selves to prove condonation, but the party may express his
 intention in writing, or he may say in terms, "I do so and
 "so."
 KEATS
 v.
 KEATS AND
 MONTEZUMA.

The jury, after a lengthened deliberation, returned as their verdict:—

1. That Mrs. Keats had committed adultery.
2. That Mr. Keats had not condoned the adultery; and assessed £1,000 as damages against Don Pedro.

1859. *Mr. Phinn*, Q.C., moved the Court¹ to decree a dissolution
 February 1. of the marriage, and to condemn the co-respondent in the
 damages assessed by the jury, viz. £1,000, and in the costs
 of the suit.

Dr. Phillimore, Q.C. (*Mr. Thring with him*), moved the Court for a rule to show cause why the verdict should not be set aside, and a new trial granted, on the grounds—first, of misdirection; secondly, that the verdict was against the evidence. 1. As to misdirection. The definition given by the Judge Ordinary to the jury of condonation is incorrect, and if incorrect, there must be a new trial. He defined it as a "blotting out of the offence imputed, *so as to restore the offending party to the same position which he or she occupied before the offence was committed.*" The part of the definition sought to be impugned is that which makes the restoration of the offending party to his or her former position indispensable to condonation. This doctrine is novel to our matrimonial law, is inconsistent with the established principles of condonation as recognized in our Ecclesiastical Courts, and, if admitted, would lead to mischievous consequences. The word and doctrine of condonation was introduced into the law of England from the Canon Law. The expression "con-donatio" does not even occur in the Civil Law. The definition is not correctly deduced from the etymology of the

¹ *Coram* THE LORD CHANCELLOR (LORD CHELMSFORD), WIGHTMAN, J., and THE JUDGE ORDINARY.

word. *Condonare*, from which it is derived, is used in three senses: first, as *donare*, *largire*; secondly, *remittere*, *non exigere quod debetur*; thirdly, to forgive or remit a debt or offence, and is so used by Cicero: "*Nec deprecaturi sumus ut crimen hoc nobis condonetis*" (Cic. Pro Milone). "*Qui pecunias creditas debitoribus condonandas putant*" (De Off. l. ii. c. 22). Condonation, at the furthest, means no more than forgiveness. The definition is also at variance with the doctrine of condonation as recognized in the Canon and English law. According to the Canon law, there were two kinds of condonation: 1st, express condonation by words only; 2nd, implied condonation, deduced from the conduct of the party injured, as from renewing or continuing cohabitation. Thus Sanchez, *De Matrimonio*, lib. x. Disp. 14, s. 1: "*Observandum est (cum Barbosa) reconciliationem conjugis adulteri esse duplicem, quandam expressam, aliam vero tacitam. Expressa est, quando expresse remittitur adulterium. Tacita autem est, quando facto ipso animus condonandi indicatur.*" Ayliffe, in his '*Parergon*,' p. 226, mentions as one of five bars to a suit for divorce on the ground of the wife's adultery:—"If the husband has reconciled himself to her after the adultery committed by her, or knowingly retains her after she has committed adultery." This doctrine is substantially translated by Lord Stowell in *Beeby v. Beeby*, 1 Hagg. Eccl. 793, where he says:—"Now condonation is forgiveness legally releasing the injury. It may be express or implied, as by the husband cohabiting with the delinquent wife; for it is to be presumed that he would not take her to his bed again unless he had forgiven her." And at p. 797: "What is the effect of condonation? In general it is a good plea in bar: it is not fit that a man should sue for a debt which he has released.—A man, it is true, who has forgiven adultery cannot bring a suit."

The definition of the Judge Ordinary is moreover inconsistent with the clearly established doctrine of implied condonation, evidenced by matrimonial intercourse with the wife after knowledge of her adultery. For he may have sexual intercourse without restoring her to her former position. He may refuse to live with her or to allow her to associate with his children, and yet by having connection with her he will

1859.
February 1.
—
KEATS
v.
KEATS AND
MONTEZUMA.

1859.
February 1.
—
KEATS
v.
KEATS AND
MONTEZUMA.

not have condoned her adultery. Apply the principles enunciated by Sanchez and Lord Stowell to the facts of this case and it will be found that there is a clear case of express condonation.

II. But even assuming this definition of condonation to be correct, the verdict is against the evidence. The expressions used by Mr. Keats to his wife at their interview, "I hope we shall understand each other better, but we must not revert to the past," did, under all the circumstances of the case, and taken in connection with his correspondence with Miss Janvrin, and with what he said when going to Mr. Guy's, "that he loved his wife, and if he could get this matter over he should be happy; he thought they might be happy, as Esther had no children," and with his correspondence with Mrs. Marrett, prove an intention on his part of restoring her to her former position.

THE LORD CHANCELLOR: At the utmost, the evidence shows no more than an intention to condone.

THE JUDGE ORDINARY: I find no trace of any evidence that Mr. Keats intended to live with his wife again after "the matter was quietly settled."

Rule Nisi granted.

February 4. Mr. Phinn, Q.C., Dr. Addams, Q.C., and Mr. H. Giffard, showed cause. I. There has been no misdirection. The definition of the Judge Ordinary is correct. Condonation in Ecclesiastical law has a technical meaning. It signifies such forgiveness as is pleadable in bar to a suit for divorce. Sanchez used it as equivalent to reconciliation, which implies the restoration of the guilty party to her former position. By the law of England, condonation is only constituted by continuing or renewing sexual intercourse. [THE JUDGE ORDINARY: You are raising rather a serious question, because if so, there can be no *condonatio per verba*.] It is submitted, that Sanchez's doctrine of *condonatio per verba* was never incorporated into our Ecclesiastical law. It may be doubted whether the passage in *Beeby v. Beeby*, which is relied on by the other side, emanated from Lord Stowell. It is in-

consistent with what he had said in *Dance v. Dance*, 1 Hagg. Eccl. 794, n. "They never, as far as appears, *bedded together* afterwards, and therefore what has been said of condonation is out of the question." The Report of the judgment in *Beeby v. Beeby* may be incorrect, and it appears that it was only a collation of two contemporary manuscript notes. *Ibid.* p. 799 n. Moreover, if Lord Stowell did say what he is there reported to have said, it was extrajudicial. There is no reported case of condonation having been established by forgiveness *per verba*. According to the books of practice in the Ecclesiastical Courts, forgiveness, if it is not followed by sexual intercourse, does not amount to condonation. Oughton's *Ordo Judiciorum*, tit. 214. *Savile v. Savile* is the only case in the books in which mention is made of constructive condonation. It is referred to by Sir John Nicholl in his argument on *Matthews v. Warner*,¹ where the question raised was whether a Commission of review should be granted upon a sentence of the Delegates, and Lord Hardwicke mentioned it as one of the circumstances which inclined him in favour of granting the Commission, that the sentence tended to establish a proposition of great importance to future cases, and which had not been before established by any decision in this country, namely, the law of the Canonists and Civilians, that forgiveness of adultery might be collected from facts and circumstances, so as to bar the husband from the right of divorce.

II. If the Judge Ordinary's definition is correct the verdict is not against the evidence. There is no evidence of Mr. Keats having manifested an intention of restoring his wife to her former position.

Dr. Phillimore, Q.C. (*Mr. Thring* with him), in support of the rule. I. Condonation as a bar to the husband's suit for divorce may be constituted and evidenced by words as well as by acts. This doctrine, as enunciated by Sanchez,² was recog-

¹ 4 Ves. 202, and referred to in *Best v. Best*, 1 Add. 413.

² The passages cited from Sanchez were lib. x. Disput. 5, s. 19:—
"Ultimus casus est quando conjux innocens alteri condonet adulterium et sic reconciliantur. Cum enim divortium fit in favorem innocentis potest innocens cedere jure suo, delictumque condonare et sic cessabit

1859.
February 4.
—
KEATS
v.
KEATS AND
MONTEZUMA.

1859.
February 4.
—
KEATS
v.
KEATS AND
MONTEZUMA.

nised by Lord Stowell in *Beeby v. Beeby*, and by Dr. Lushington in *Snow v. Snow*, 2 Notes, Cas. Supp. XIV. The authority of the Report in *Beeby v. Beeby* has been impugned, yet it is well known that Lord Stowell never allowed his judgments to be printed unless supervised by himself. *Savile v. Savile*, if anything, is in favour of the respondent. For Lord Hardwicke there did not throw out any doubts as to the recognition by the law of England of *condonatio expressa*, but of *condonatio tacita*. If the contention of Dr. Addams is correct, that there is only one mode by which condonation can be constituted and evidenced, namely, by sexual intercourse, what would be the consequences? A husband might invite his guilty wife to return to his home, she might come back and live under the same roof with him, and yet if sexual intercourse were not proved, there would be no condonation. Again, suppose the case of a husband separated from his wife by an involuntary absence from her in foreign parts, who may have had information of her adultery, and is desirous of condoning it, he would be precluded from doing so by reason of their separation. The doctrine of condonation is not so understood in the books of practice. In Poynter on Marriage and Divorce, p. 232, it is said condonation may be direct or implied: "direct, when expressed by words "or in writing; and implied, if the husband, after reasonable knowledge of the infidelity of his wife, continues to admit her as the partner of his bed." This is in conformity

jus divortii. Hæc autem remissio est duplex, quædam expressa quando scilicet verbis expressis innocens conjux adulterum sibi reconciliat, condonans delictum. De quâ reconciliatione loquitur textus . . . probans ex tunc minime audiendum esse maritum de adulterio accusantem . . . non tamen satis esset remissio mente retenta nec signo aliquo externo conjugi nocenti expressa. . . . Alia autem est remissio tacita, ut si conjux adulterii conscius alium non exclusit à consortio maritali vel exclusum admisit." Again, lib. x. Disput. 14, s. 1:—"Jam in præsentī disserendum est quando censeatur condonatum adulterium ita ut ratione illius divortium celebrari nequeat, aliave accusatio criminalis aut civilis intentari. Et observandum est cum Barbosa reconciliationem conjugis adulteri esse duplicem, quandam expressam, aliam vero tacitam. Expressa est quando expresse remittitur adulterium; de quâ loquitur textus . . . decidens ex tunc maritum volentem accusare, audiendum non esse. . . . Tacita autem est quando facto ipso animus condonandi indicatur, nam factum non minus quam verbum animum indicant.

with both the Scotch and American law. 1 *Frazer's Law of Scotland*, p. 666; *Bishop on the Law of Marriage and Divorce*, l. iv. c. 19, s. 356; 2 *Kent's Commentaries*, p. 100; *Quincey v. Quincey*, 10 New Hampshire Reports, 233.

1859.
February 4.

KEATS
v.
KEATS AND
MONTEZUMA.

By condonation a husband gives up his right to sue in a court of justice for the injury inflicted on him by his wife. According to Sanchez, it is a concession of the *jus divortii*. A man may intend to give up this right without intending to restore his wife to her former position. It does not follow that because a wife is not in a position to compel the restitution of conjugal rights, her husband may not have barred himself from his right to a divorce. In *Beeby v. Beeby*, p. 797, Lord Stowell says:—"It does not follow that "the same act which will bar the remedy, will operate on "the other side." [THE JUDGE ORDINARY: You must take that passage *secundum subjectam materiem*. Lord Stowell is dealing with the question of *compensatio criminum*, where both parties are guilty.] Condonation is the remission of the penalty incurred by the wife, namely, the remission of her right to sue for a divorce. [THE LORD CHANCELLOR: You rather limit the nature of the penalty incurred by the wife. Her liability to be sued for a divorce is not the whole of the penalty. She has also forfeited her right to insist upon cohabitation. If condonation is a release of the whole of the penalty, you should embrace in your definition her right to insist upon renewed cohabitation.]

II. We submit that even if the definition is correct, there is evidence of an intention on the part of Mr. Keats to restore his wife to her former position.

THE LORD CHANCELLOR (LORD CHELMSFORD): In this case an application is made to the Court for a new trial on two grounds: first, that the Judge Ordinary misdirected the jury as to the law of condonation; secondly, that even if there were no misdirection, the verdict of the jury was contrary to the evidence in finding that there was no condonation. The first question is undoubtedly one of very great and general importance, as the Court is called upon to decide whether a definition of condonation, which the learned Judge had for the first time to give, is or is not correct, and whether it is to

1859.
February 4.

KEATS
v.
KEATS AND
MONTEZUMA.

be adopted as the principle upon which all similar cases are for the future to be decided. It is admitted that there is nothing to be found in the Reports in the Ecclesiastical Courts in explanation of this term, the reason of which was clearly explained by the Judge Ordinary. The judges of the Ecclesiastical Courts were judges both of the law and of the facts, and when any question of condonation arose before them, the law was never argued, because it was supposed to be well known and in the breast of the judge, and the argument therefore turned upon whether the facts proved amounted to condonation. This word is one which has long become peculiar to the Ecclesiastical Courts, and, like many other words which are familiar to us by daily use, was believed to be thoroughly understood till the necessity arose for defining it. The Legislature having directed that, in cases of this description, questions of fact should be decided by a jury, it became necessary for the learned Judge to explain to them in this case what amounted in law to condonation. This he did by stating that it meant "a blotting out of the offence imputed, so as to restore the offending party to the same position which he or she occupied before the offence was committed." Every one who heard this clear enunciation of the meaning of the term would know that the learned Judge, by the words "blotting out the offence," could not be understood as speaking literally, because the offence having been committed, could not actually have been blotted out, but must have been received in the sense of its being no more remembered against the offending party. We have the highest sanction for this form of expression, "I am He that blotteth out thy transgressions, and will not remember thy sins." That, of course, is not a promise of the obliteration of things past, which is impossible; but it means, I will so act towards you as if the transgression had not taken place, and the sin shall be no more imputed to you. But the second part of the proposition, as stated by the learned Judge, explains as well as restricts the first part. It must be such a blotting out of the offence as restores the wife to her former position. This is contended to be incorrect, because it excludes a condonation by words only; for it is said there are two sorts of condonation, one express or by words only; the

other implied, as by taking back a delinquent wife and cohabiting with her. On the other hand, the distinction in the law of condonation is denied, and it is asserted that no condonation by words only, however strong, will be sufficient, unless they are followed by sexual intercourse. I think it is unnecessary to resort to the Roman classics for the interpretation of the term condonation, or to Sanchez for his definitions and distinctions. Words in the course of time often depart very widely from their original meaning, and a foreign author, however learned, may be entitled to deference, but cannot be regarded as an authority by the Court. The description of condonation by Lord Stowell in *Beeby v. Beeby*, that it is a "forgiveness legally releasing the injury," is that which is principally relied upon by the counsel for the wife, and it has been insisted that it proves that words alone are sufficient to amount to condonation. In the course of the argument it was even mentioned that, if the husband with knowledge of the adultery, were to say, "I forgive you, but "will never see you again," the forgiveness is complete by the first words, which are not susceptible of any qualification. But surely such a proposition is not reasonable, and if it were admitted, it would lead to every species of artifice or influence to extort from the injured party the healing words which are to be of such powerful and uncontrollable efficacy. The strong and sudden impulse of recollected affection, the importunity of friends, or the surprise of weakness, each of these might produce a hasty expression of forgiveness which, when once uttered, would be irrevocable. How naturally, too, compassion for a guilty creature, associated with the remembrance of former days of happiness, would find vent in such an expression. Those who felt that perpetual separation must be the inevitable consequence of the unpardonable fault, might still anxiously desire to lighten the load of despair by some kind words of consolation and peace. This is not the forgiveness which amounts to condonation, but rather which declares it to be impossible. If I might be permitted to borrow an illustration from poetry, the distinction between forgiveness and reconciliation is nowhere more strikingly shown than by a poet who, more than most other men, has sounded the depths of human feeling, and who supposes the

1859.

February 4.

KEATS

v.

KEATS AND
MONTEZUMA.

1859. question put to the husband of an adulteress, "Her did you
February 4. "freely from your soul forgive?" to which he replies:

KEATS
v.
KEATS AND
MONTEZUMA.

"Sure as I hope before my Judge to live,
Sure as the Saviour died upon the tree
For all who sin—for that dear wretch and me—
Whom never more on earth will I *forsake or see*."

But following out the idea conveyed by Lord Stowell's language in *Beeby v. Beeby*, that a condonation is a good plea in bar, as it is not fit that a man should sue for a debt which he has released, the counsel for the wife argued that it must be wrong to say that the forgiveness must be such "as to restore her to her former position," because the debt which the wife has incurred is the liability to be sued for a divorce, and that if the husband gives up his right to proceed against her, her offence is condoned, although her former position is not restored. There is no greater fallacy than that of carrying analogy too far, and supposing that because there is resemblance between two things in one point, they therefore correspond in every respect. In this instance, the injury which a wife has committed by her infidelity is compared to a debt, for the purpose of illustration; it is something which the person to whom it is owed has the right to release. But the condition in which an unfaithful wife stands to her husband is rather that of a person who has incurred a penalty; she has exposed herself to a proceeding to dissolve the tie of marriage, and she has lost her right to insist upon cohabitation. The release of the husband's right to proceed for a divorce does not reach the whole of the penalty incurred, and therefore cannot be complete forgiveness, because it falls short of restoring her to her former position. If it is true that forgiveness (as was argued) is an act of the mind, it can only be manifested by words or by outward acts. The acts which prove forgiveness may be so strong and unequivocal, as by taking home an offending wife and cohabiting with her, that they may conclusively establish condonation. But words, however strong, can at the highest only be regarded as imperfect forgiveness, and, unless followed up by a something which amounts to a reconciliation and of a reinstatement of the wife in the condition she was in before she transgressed, it must remain incomplete. It has been argued

that nothing less than renewed sexual intercourse will be sufficient to establish condonation. It is obvious, without adducing instances to illustrate my meaning, that that in some cases may be a test wholly inapplicable. But I am willing to adopt an expression which was happily used by Wightman, J., in the course of the argument, and to say that in my judgment there can be no condonation which is not followed by "conjugal cohabitation." This is clearly the opinion of Dr. Lushington in the case of *Campbell v. Campbell*, Deane's Ecc. Rep. 288. To say that condonation requires conjugal cohabitation or connubial intercourse, leaves the nature of the cohabitation or intercourse to be adapted to the varying condition and circumstances of different parties. This will also justify the language of the learned Judge Ordinary, that the forgiveness must be shown by a restoration of the wife to her former position. This does not mean that the cohabitation is to be renewed with all the circumstances which surrounded her former life; to accomplish this is beyond the power of the husband. She may live with him as a wife, but live as a degraded wife. The degree or extent to which all her former privileges may be restored to her does not enter into the question; by her infidelity she has forfeited all her title to be regarded as a wife. Condonation is a pardon which is not necessarily absolute, but which may be accompanied with conditions. I see no reason at all to differ with the Judge Ordinary in the way in which he has stated the law of condonation to the jury; but with him I think that the forgiveness which is to take away the husband's right to a divorce must not fall short of reconciliation, and that this must be shown by the reinstatement of the wife in her former position, which renders proof of conjugal cohabitation, or the restitution of conjugal rights, necessary. Secondly, it is however said that, even if the definition of the learned Judge is correct, yet the verdict is contrary to the evidence. But I have great difficulty in understanding how, if the first point of misdirection fails, the other can possibly succeed; because, if condonation requires all the circumstances stated in order to render it available as a defence, it can hardly be contended that the proof given approaches at all near what is necessary. Even if the more favourable proposition, "that the act of pardon may be done by word of

1859.

February 4.

KEATS

v.

KEATS AND
MONTEZUMA.

1859. February 4. *KEATS v. KEATS AND MONTEZUMA.* "mouth," is accepted, still the evidence falls short even of this. There is nothing which shows anything more than an inclination, or it may be an intention, to condone. The husband was anxious to avoid publicity; he desired an amicable arrangement. The wife's family availed themselves of this disposition to endeavour to draw him on to a reconciliation, but they never succeeded; and it would be occupying time most unnecessarily to show that the evidence fully justified the verdict which was pronounced.

WIGHTMAN, J., entirely concurred with the Lord Chancellor. *Rule discharged.*

Mr. Phinn then prayed the Court to decree a dissolution of the marriage, and to condemn the co-respondent in damages and costs.

Dr. Phillimore prayed to be heard as to the wife's costs.

BY THE COURT: You are too late for that now; your application should have been made before the cause was heard. The foundation of the rule of the Ecclesiastical Court was, that the wife should be enabled to bring her case to a hearing, and defend herself, and so up to any time previous to the hearing the husband was generally liable to have the wife's costs taxed against him, and the Court has so far followed the rule, as in *Evans v. Evans and Robinson*, ante, p. 328; but if the wife has brought her case to a hearing, howsoever, and fails, the husband has never then been made liable to her costs.

Dr. Phillimore then asked for a sum of money to be secured to the wife, under the provisions of the 32nd section of the Divorce Act. Mrs. Keats had no fortune. On the marriage a settlement was made by Mr. Keats, by which, in case she survived him, she would be entitled to the interest of £10,000 for her life, with the power of disposing, by will, of one-fifth of that sum.

Mr. Phinn proposed, on the part of Mr. Keats, that he should secure to Mrs. Keats an annuity of £150, on condition of her releasing her interest under the settlement.

BY THE COURT: We have no desire to interfere with the settlement; on the whole, we think it fair that a deed should be prepared by a conveyancing counsel, securing, during Mr. Keats's life, an annuity to his wife of £150 *quamdiu casta vixerit*, on condition of her giving up the power of disposal of the one-fifth under the settlement. With respect to the £1,000 damages assessed by the jury, let that sum go, 1st, in payment of Mrs. Keats's costs; then, to Mr. Keats's costs, and the surplus, if any, in satisfaction of the annuity to be paid to Mrs. Keats.

1859.

February 4.

KEATS
v.
KEATS AND
MONTEZUMA.

(*Before the Full Court,—The LORD CHANCELLOR (LORD CHELMSFORD),
WIGHTMAN, J., and the JUDGE ORDINARY.*)

SMITH
v.
SMITH.

SMITH v. SMITH.

*Petition for Dissolution.—Desertion not proved.—Decree for
Judicial Separation.*

Where the wife asks for a dissolution of marriage on the ground of desertion and adultery, she must prove affirmatively that the absence of her husband commenced and continued against her consent; in absence of such proof the Court refused to decree the dissolution prayed, but the adultery being clearly proved, decreed a judicial separation.

This was a petition for dissolution of marriage at the suit of the wife, by reason of the husband's desertion and adultery. The petition alleged the marriage in December, 1848, and cohabitation in Birmingham, and that on or about the 30th of January, 1852, the husband had deserted the wife, without cause, and from that time lived apart and contributed nothing to her maintenance; and had cohabited at different periods with two women, whose names were set out in the petition. The prayer of the petition was simply for a dissolution of the marriage.

The respondent did not appear, and the case now came on for proof by oral evidence.

A married sister of the petitioner was the principal witness as regarded the desertion. From her evidence it appeared that the respondent was, at the time of his marriage, working

1859.
February 4.

SMITH
v.
SMITH.

in a gun-barrel factory at Birmingham, where they afterwards resided. About six months after the marriage, the petitioner, upon the death of her father, became entitled to £80, which was received and spent by her husband; he soon became of drunken and dissipated habits, treated his wife with great harshness, frequently using foul and threatening language towards her, and on one occasion, on a cold night in January, 1850, he turned her out of doors, and only readmitted her on the earnest entreaties of the witness. In consequence of his neglecting his business his employers discharged him, and he became principally dependent on his wife's earnings, as a dress-maker, for support. In the beginning of January, 1852, he sold off some furniture to buy drink, and on the witness remonstrating with him for so doing, he replied "that he would "sell and break every damnation thing in the house, and make "her" (meaning his wife) "keep him." Later in the same month, the respondent told his wife (in the witness's presence) that he should "leave her, and that she might walk the streets "for a living." Shortly afterwards he told his wife that he was going to leave the town, that she should never see him again, and then went away, taking his clothes, etc. with him. The petitioner remained in the house about a fortnight, and then (the respondent not having returned), without making any inquiries for him, went to her sister's, where she had remained ever since, principally supporting herself by dressmaking. A witness by the name of Parkes, who had long known the petitioner, had traced the respondent as having been living at Bristol, Liverpool, Dublin, and Wolverhampton since 1852, and had seen him on the 10th of May, 1858, in Birmingham, when he urged on him to do something to support his wife, who was then in ill-health. The respondent said he would do nothing voluntarily, and if any attempt were made to force him, he would leave the town, as he was determined to have nothing more to do with her. He also admitted that he was living in adultery.

THE LORD CHANCELLOR : The petitioner has this difficulty to contend with. She has not shown that the respondent knew where she was living after he left her. It does not appear that he has known where she has been residing since that time.

The petitioner's sister was recalled, and stated that she was not aware that the respondent knew her address, or that the petitioner had been living with her since he had left her.

1859.
February 4.
SMITH
v.
SMITH.

THE JUDGE ORDINARY: Have you any evidence to show that the separation was against the wish of the wife?

Dr. Spinks: Under the circumstances of the case it cannot be said that the wife was a consenting party to the separation. There is no evidence that she ever said anything assenting to it. She remained a fortnight in the house after he had left her, thereby giving him an opportunity to return, if he chose. That does not look like assent.

THE LORD CHANCELLOR: The petitioner in this case is the wife, and she prays for a dissolution of her marriage by reason of the adultery of her husband, coupled with desertion, without reasonable excuse, for two years and upwards. It is necessary that the Court should be very strict indeed in regard to the proof of the circumstances which enable the wife to obtain a decree of dissolution of marriage.

It is essential in this case, as the foundation of the decree prayed for, that the petitioner should show clearly and satisfactorily that there has been desertion. Here it appears to the Court, that the proof of desertion entirely fails. There is nothing to satisfy the Court that, when the parties separated, the husband went against the will of his wife. On the contrary, there are circumstances in the case which induce the Court to believe that it is extremely probable that they parted by mutual consent. It is shown that the respondent was a man of vile habits and bad temper, and treated the petitioner with great cruelty, and that on one of the last occasions they were together, he told her "he should leave her and that she "might walk the streets for a living."

When the separation took place, part of their furniture had been sold by him, to indulge his passion for drink, but some remained. There is nothing to show that the wife was desirous of retaining the husband at that time; on the contrary, there appears to have been a desire on her part to separate, for she goes to live with her sister, and makes no inquiries

1859. after her husband for a considerable period of time, and there
February 4. is no proof that he knew where she was living. If the Court
SMITH were to permit this evidence to be taken as satisfactory proof
v. of desertion, it would lead to great laxity. Desertion in this
SMITH. case is the very foundation on which the right of the wife to
a dissolution of her marriage rests.

But the Court is of opinion, that, although the petitioner applies only for a dissolution of marriage, yet that it is competent to it to grant such relief as the facts of the case warrant. Here there is ample evidence (adultery having been proved) to warrant the Court not in pronouncing for a dissolution of the marriage, on account of the absence of satisfactory proof of desertion, but for a judicial separation. That sentence will have all the consequences of a sentence of dissolution of marriage, except that the petitioner will not be able to marry again.

The Court, therefore, decrees a judicial separation, and condemns the husband in costs.

Judicial separation decreed with costs.

1858. (Before the Full Court,—COCKBURN, C.J., WIGHTMAN, J., and the
June 14, 15, 16, JUDGE ORDINARY.)
21; Nov. 26.

And
1859. ROBINSON v. ROBINSON AND LANE.

March 2. *Petition for Dissolution.—Co-respondent.—Evidence.—Admissions by Respondent.—Competency of Witnesses.—Counsel.—Practice.—21 & 22 Vict. c. 108, s. 11.—Co-respondent dismissed from the Suit and examined as a Witness.—Effect of Wife's Admission of Adultery unsupported by confirmatory Evidence.*
ROBINSON
v.
ROBINSON AND
LANE.

The admissions or confessions of the respondent are not admissible evidence against the co-respondent.

The counsel for the respondent is entitled to address the Court before the counsel for the co-respondent, but this may be varied by arrangement between the counsel.

Where by such arrangement the co-respondent's counsel first addressed the Court and examined the witnesses, the counsel for the respondent was not allowed to cross-examine such witnesses.

Where the petitioner's case depended on alleged confessions contained in the wife's diary, uncorroborated by independent evidence, the Court exercised its discretion under 21 & 22 Vict. c. 108, and dismissed the co-respondent, who was thereupon examined for the respondent.

1858.
June 14, 15, 16,
21; Nov. 26.
And
1859.

On the acquittal of the co-respondent, the alleged adulterer, the suit against the wife need not of necessity fail.

March 2.

The admissions of a wife charged with adultery, unsupported by any confirmatory proof, may be acted upon as conclusive evidence upon which to pronounce a divorce, provided the Court is satisfied that the evidence is trustworthy, and that it amounts to a clear, distinct, and unequivocal admission of adultery; but where, on a consideration of the whole diary, the wife appeared to indulge unfounded imaginations and exaggerated statements as regarded her intercourse with the other sex, the Court refused to add anything by way of inference, as it would have done if similar facts had been proved by independent evidence, to the actual statements of the diary, and, as these fell short of a direct confession of the act of adultery, dismissed the petition, but without condemning the husband in costs, on the understanding that the wife had a separate income

ROBINSON
v.
ROBINSON AND
LANE.

This was a suit for dissolution of marriage brought by the husband against the wife, by reason of her adultery with Dr. Lane, the co-respondent.

The petitioner, Mr. Robinson, was a civil engineer, and in February, 1844, married the respondent, then Mrs. Dansey, a widow. She had an income of between £400 and £500 a year, which was settled upon herself. Among other places at which they resided after their marriage, was Edinburgh, and there, in 1850, they became acquainted with the co-respondent, Mr. (afterwards Dr.) Lane. In 1852, Mr. and Mrs. Robinson left Edinburgh, and took up their residence at Reading, where they renewed their acquaintance with Dr. Lane, who was then residing with his wife and her mother, as the head of a hydropathic establishment, at Moorpark, near Farnham. In that and the two following years, Mrs. Robinson paid several visits at Moorpark, and it was during certain of these visits that the adultery charged was alleged to have been committed. In 1857, Mr. Robinson, during an illness of his wife, unexpectedly discovered three or four manuscript volumes, in her handwriting, purporting to be a journal kept by her for a period of between four and five years. Certain of the entries in this journal appeared to him to contain conclusive evidence that she had been guilty of adultery with Dr. Lane on

1858. various occasions in 1854 and 1855, and he accordingly instituted a suit for a divorce *à mensd et thoro*, in the Consistory Court of London. Mrs. Robinson appeared to the suit, but her counsel admitted at the hearing, that after reading the evidence, he was unable to repel the charge of adultery, and the Court being satisfied upon the evidence¹ before it, thereupon decreed a sentence of divorce. It appeared that Dr. Lane, whilst the suit was pending, had information of these proceedings, but that he took no part in them, and was not, as he might have been at the instance of the wife, vouched or examined as a witness.

June 14, 15, 16, 21; Nov. 26.
And
1859.
March 2.

ROBINSON
v.
ROBINSON AND
LANE.

Mr. Montagu Chambers, Q.C., *Dr. Addams*, Q.C., and *Mr. Karslake*, appeared for the petitioner; *Dr. Phillimore*, Q.C., for the respondent; *Mr. Forsyth*, Q.C., and *Mr. Coleridge*, for the co-respondent.

Mr. Chambers, Q.C., in stating the petitioner's case, said he was doubtful whether there was evidence sufficient to fix Dr. Lane as the person with whom Mrs. Robinson had committed adultery; he proposed to put in evidence certain diaries written by Mrs. Robinson.

Mr. Forsyth, Q.C., on the part of Dr. Lane, objected to these diaries being read at all. The proceeding here was different from that before the Ecclesiastical Courts; there was now a third party, the co-respondent, before the Court. If Mrs. Robinson was found guilty of adultery, it could only be with Dr. Lane; but her admissions or confessions, if the diary were to be so taken, could be no evidence against him, and therefore ought not to be used at all.

COCKBURN, C.J.: In the Ecclesiastical Court, and on a bill before the House of Lords, such admissions would have been received as evidence. You cannot suppose that this Act intended to put the petitioner in a worse position as to evidence than he would have been under the old system.

¹ The material evidence taken in the Consistory Courts consisted of the diary and of the *then* uncontradicted evidence of Levi Warren of acts of improper familiarity between Dr. Lane and Mrs. Robinson.

THE JUDGE ORDINARY: There seems no pretence for your objection. These diaries may be good evidence to prove her adultery, but they are not admissible to fix Dr. Lane with anything. So in the case of several persons indicted for burglary or conspiracy; one may be convicted on his own confession, which, though in terms involving the others, is no legal evidence against them.

1858.

June 14, 15, 16,
21; Nov. 26.

ROBINSON

v.
ROBINSON AND
LANE.

COCKBURN, C.J.: If the petitioner were proceeding under the 33rd section to claim damages, there might be some ground for the objection. The reason why in an action for crim. con. the wife's evidence could not be used for the plaintiff, was because it might affect a third party; but here there are no damages sought, and it would be monstrous to say that this Act, which was intended to facilitate proceedings, should limit them in this way as to evidence.

The case for the petitioner was then proceeded with; the diaries written by Mrs. Robinson were put in evidence; witnesses were also examined in support of the charge of adultery; but only one of them, namely, Levi Warren, who was subsequently shown to be unworthy of credit, gave evidence of improper familiarities between them.

On a perusal of the judgment, it will be seen that it turns entirely on the value of the affirmative evidence produced by the petitioner, namely, certain entries in a voluminous diary kept by Mrs. Robinson, and the Court, considering that evidence insufficient by itself to support a decree of dissolution, did not feel called upon to estimate the value of Dr. Lane's evidence, who was subsequently examined. In determining the weight to be given to the particular entries relied upon by the petitioner's counsel, the Court considered the character and peculiarities of Mrs. Robinson, as disclosed by the whole journal; it is therefore thought advisable to print the following extracts from that journal, and some pains have been taken to choose such portions as should give a fair idea of the whole.

The petitioner's counsel relied mainly on the entries dated the 7th, 8th, and 10th of October, 1854, and June the 14th, and others printed in italics.

1858.

*Extracts from Mrs. Robinson's Diary.*June 14, 15, 16,
21; Nov. 26.ROBINSON
v.
ROBINSON AND
LANE.

" 1852. 27th (March, at Edinburgh).—Fair, cold morning, sunny and cheerful afterwards. Rose late. Could not go to class. Boys out with Musgraves. Resolved to get ready early for the drive, to which I could not help looking forward with pleasure, not unmixed with a *dread* that something seemed to mar the pleasure I had promised myself, as it nearly always does with me. A glass of sherry gave me a confused headache; then the boys annoyed me by being rude in the garden. I dined in haste, and left home immediately, not to lose the fairness of the day. When I got there, after some delay and confusion, I found Mrs. L— was to go too, and I knew well that all hope of a pleasant *tête-à-tête* was over for that day. I could hardly bid her and Atty welcome, or affect good humour, much less gaiety. The boys were outside. The talk was formal and confused. Mr. L— read scraps from Coleridge and Tennyson. We talked of a paper in 'Chambers,' which he had written at my request, on the error of sudden judgments unfounded on knowledge of the subjects spoken of. They disapproved of the title of the paper, and were not interested in the subjects. We went to Cramond by Granton, got out, walked by a steep path to a sheltered sunny corner, laid out the plaids, and spread the books, but no real cheerfulness came to my heart. Mrs. L— and the boys gathered gorse, and we read a few disjointed passages from our poets ('Ode on Dejections'), talked of life, of Cana, of property, of riches, and of birth; of Mr. S. Russell and the Christmas I had spent there; of dejection, education, poverty, etc. We rose to go when the sun got low. Got into the carriage and kept up a conversation regarding Mr. Combe, his school, etc., wholly without interest on my part; duly admiring the views which were fine. We deposited the party at their home, and my own starved boys came off the box and got inside. I got back at half-past six, as much vexed, disappointed, chagrined, and cast down as I ever remember to have been. I must have left a bad impression on both of them. Mrs. L— looked several times cold and puzzled; he was constrained; the child was tired; no one was obliged or pleased. I had spent 8 shillings for worse than nothing.

" Good God! why is it everything I plan or wish for is 1858.
 " turned to such bitterness? Surely it must be my own June 14, 15, 16,
 " fault. I long for things I ought not to prize. I find it 21; Nov. 26.
 " impossible to love where I ought, or to keep from loving ROBINSON
 " where I ought not. My mind is a chaos—a confused 2.
 " mingling of good and evil. I weary of my very self, yet ROBINSON AND
 " cannot die. I know not where to turn for help, and a dull LANE.
 " load of dejection and nameless oppression weighs down my
 " very soul. I have no sympathy, no love, for I do not de-
 " serve it. My darling boys are the only ray of comfort I
 " possess. Felt a sad relief in thus writing the history of a
 " lost day. I read and copied some lines, and retired at 12
 " to a sad and lonely couch, sick and low at heart. Cold line
 " from Mr. L— to say Dr. Guthrie would not preach on
 " morrow. I was to have gone with them."

" 7th (April).—Very fine, clear, agreeable day. Miserably
 " and unusually depressed. Up late. Henry cross and rude;
 " wrote to mother complaining of him. . . . Mrs. L— very
 " kind; she is a sweet, amiable temper, and shines when
 " there is any sorrow to be soothed. Saw them all when I
 " called for her. Mr. L— careless in manner, and hardly
 " looked at me. I looked very ill; every one remarked it,
 " both then and afterwards. . . . Mr. L— chatted with
 " every one in the room, and was more gay and talking than
 " usual. I was wretched; and as I got out of the fly at my
 " house and shook hands with them with a hand cold as
 " marble, I felt that I was not fit for their society. Stole to
 " my room; heard from E— that all was well, and retired to
 " rest thoroughly mortified."

" 13th.—Very fine and warm. Up eleven. Otway, not
 " well. Alfred school, St— cross. Dinner in dining-room.
 " Sat in garden; read Schlegel; drove shops at 4, and to
 " Lady D—'s for Atty about 5, as he was out before. Chil-
 " dren played in garden; St— very quarrelsome; his temper
 " is excitable and passionate. Took Atty back at 8. Mr.
 " L— in good humour; sat by me; Mrs. L— beyond him,
 " at lecture. We talked of nicknames and of grave characters,
 " and I was merry, much excited by presence. Lecture about
 " Homer; the simplicity and nature that mark his poems; his
 " talents; Latin, Greek poets; modern poets; passages read

1858. "and translated; amusing and original. We laughed much.
 June 14, 15, 16, "Mr. L— walked back with me; Mrs. L— and Miss R—
 21; Nov. 26. "walked on in front out of hearing. We spoke of weather,
 ROBINSON "quoted poetry on the subject, discussed Homer, Shake-
 v. "speare, talent, etc. These dark walks are very exciting;
 ROBINSON AND "and on retiring to my lonely bed, I was too much roused to
 LANE. "sleep, and tossed about for hours."
 "26th (*August, at Reading*).—. . . Packing and removing
 "to other rooms till 10. Henry came at 12; much discon-
 "certed to find us out of sorts. E— out; in hurry for din-
 "ner. He was cross about potatoes. He went at half-past
 "three to Pangbourne. I would not go. He did not like
 "the place as a residence, though it lies by the steep banks
 "of the Thames. I went in a chaise with St— to White-
 "knights, a fine park, not now used; the house not inha-
 "bited; parties taking tea in it and walking about. Wishes
 "to possess a quiet spot of earth, and get free from the petty
 "worry and vexation of life. Returned somewhat cheered;
 "but Henry was cross at night, and we had high words after
 "tea. I was thoroughly vexed with the idea of living with
 "him. The children are so dull and dejected when he is
 "with them; nothing goes on but gloom, sullenness, silence,
 "or fault-finding. Very unhappy; miserable day."
 "31st.—Up late, being stiff and weary. Boys came to
 "see me and then all went to river; but a thunderstorm
 "drove them in, and the morning was spent in a desultory
 "manner. Wrote to mother. Letter from Mrs. L—, who was
 "just coming home. Lady D— ill. Mr. L— had met with
 "an accident to his foot, and had not received benefit from his
 "lonely stay at Rothesay. She thought he had written to
 "me, thanked for the letters for Nicolini, and begged me to
 "write. Ah, thought I, though he is not busy, and cannot
 "even walk now, I am not in all his thoughts. Not one
 "line either of thanks for the studs or of reply to my many
 "notes could he write, though not an hour elapsed but my
 "thoughts did not anxiously and fondly go towards him.
 "Nothing but cross purposes, misplaced love, and unreturned
 "affection goes on in this sad disappointing life. Tears came
 "into my eyes as I thought of him lame and alone, and not
 "the deep bitterness of finding myself so entirely neglected

“ could fortify my heart with pride enough to despise him 1858.
 “ and forget in my turn. Wayward and deplorable dispo- June 14, 15, 16,
 “ sition. All that day and several following did the humbling, 21; Nov. 26.
 “ sorrowful truth of his utter forgetfulness, even of my friend- ROBINSON
 “ ship, follow me, and fill my heart with unspeakable sadness. 9.
 ROBINSON AND
 LANE.

“ 1854. *Reading, January 1st, Sunday.*—Rose quarter 8.
 “ This day was cold, frosty, with east wind; sunny till noon,
 “ and cheering. Not well in night, but better on rising, and
 “ felt cheerful. Restored good humour to Henry by my
 “ sunshine, and greeted the children affectionately, though
 “ they seemed rather gloomy. Breakfast with Henry; talked
 “ to him about the name of the house till 10. Upstairs
 “ awhile; wrote accounts; finished old journal. We read
 “ with the children, as usual. Began new journal, and
 “ counted up the letters I had written and received this
 “ year: 189 received, and 26 notes; 214 written, and 54
 “ notes. I reflected also on the friends I had lost since that
 “ day twelve months: two aunts, one of them my mother’s
 “ cousin; Mrs. C— and Mrs. Ch—; two children of my
 “ eldest brother, the infant and the eldest boy; poor good old
 “ Mr. S—, a sincere friend; G. D—, a brother-in-law, a
 “ trustee, and once a near neighbour, latterly a stranger and
 “ alienated; and many names from the list of acquaintances
 “ and former neighbours. Oh, how sad it is that the forward
 “ walk through life, though perhaps unmarked with many
 “ outward trials, is yet sure to remove from our side many
 “ who once walked with us, and who seemed as likely to live
 “ as ourselves. May the Great Author of the being of all
 “ beings here on earth direct our steps, and lead us to acknow-
 “ ledge and perceive the presence of good and order in the
 “ midst of seeming contradiction, pain, and sorrow. Out
 “ half-one with Alfred and St—; Alfred dull and out of
 “ sorts. It was agreeable in lane beyond Somer’s Town, and
 “ we returned cheered by the air, the views of the hills with
 “ snow on them. Dinner good, but Henry sulky and deter-
 “ mined to find fault. Read to children after dinner, and
 “ then had a long discussion with him as to the causes of
 “ his discontent. He railed at the servants, wanted a man-
 “ servant (with whom he would disagree in a month); wanted
 “ a study; wished I was a more active housekeeper; com-

1858. "plained of cold, and planned how to spend less of his time
 June 14, 15, 16, "here and more in London. I said all I could think of to
 21; Nov. 26. "bring him to some degree of reason; remarked on the

ROBINSON
 v.
 ROBINSON AND
 LANE.

"selfishness of complaints, the reasonableness of making the
 "best of things, and pointed out several small things that
 "might be done to make matters better. I was wearied and
 "ruffled with the thorough unamiableness of his disposition,
 "and stayed in the room till near 7; but he became more
 "calm, and I went out with Alfred. The wind had sunk,
 "and it was agreeable. Tea 8. Talked till after 9 about
 "the name we should give the new house. . . . I wrote
 "journal at half-nine, and Latin Ex., and to bed at 11; and
 "so closed the first day of the year, not unpleasantly, though
 "in some measure spoiled by Henry's ill-humour."

"24th (*March, Reading*).—Gloomy; northerly wind; cool,
 "dry, and not unpleasant. Up quarter past 8. Had con-
 "fused dreams of Mr. L— in night, and woke with my
 "imagination heated as though with realities. I thought of
 "the subjects that had occupied my sleeping moments all
 "day. I was alternately depressed and excited, and the day
 "was a desultory. Mr. Th— at half-nine; St— with me till
 "10. Alfred joined me soon after, and then Mr. Th— and
 "Otway. I was really sorry for the young man; he was
 "lifeless, dispirited, and lonely. Mr. R— had brought him
 "to Reading and now seemed deserting him. I resolved to
 "show him that I at least was conscious of his situation."

"3rd (*June, Reading*).—Fair, gleam of sun, wind northerly
 "and fresh; fine evening; up late. Henry gone. Sent Al-
 "fred to Mr. Th—; not come, and no better; depressed,
 "anxious, miserable, restless, tears in eyes all day. Dressed
 "and ordered dinner, and thought he would come somehow.
 "At 12 I heard his voice with boys, but was too much agi-
 "tated to see him, and ran to room as pale as a ghost, but,
 "recovering a little, descended and saw him in my room.
 "He was looking thin, pale, worn, agitated, hopeless. I
 "never saw any one so sadly changed in a week; his great
 "eyes seemed like pale violets, shaded with heavy, drooping
 "lids; his cheeks were hollow, and there was a look of
 "intense dejection about his whole person. He said he had
 "been ill, and in despair at so abrupt a dismissal. I could

"hardly command myself to talk, and had a wretched head-ache; my cheeks flushed, tears came every second to my eyes, and my voice was choked. We talked long and earnestly. I told him frankly that I believed his dismissal was more abrupt than it otherwise would have been owing to Henry's pride and tenacity; but I said then and later, that the result could have been no other in the end. He detailed his sufferings, his wretched sufferings; drudgery in Scotland; exclusion from everything, owing to not being an University man; and we named plans, most if not all hopeless. We strolled for half an hour in the garden and I became better, and then dined most cheerfully; but the wretched pallor never left his face. We went to my room, talked of sculptures, painting, Italian, etc., and he took coffee and whisky, and became animated enough to accompany us on foot when we rode. Alfred to his lodgings for 'Dickens,' etc., and met us in London Street. We sat a long while near lake at Whiteknights, and talked too much to read. I promised to write to his mother, and we exchanged addresses. He would not take my present of £15, but did not quite refuse to go to Farnham. We were desired to go, and rode through Whiteknights home. It was nearly our last interview, and our feelings were acute though not altogether sad. He was glad, he said, he ever came to Reading; so was I; yet, in truth, the parting was sad. Henry home and civil; tea; wrote all evening. Bed 12."

"4th (July, Reading, Moor Park).—Showery, but warm and fair for some hours in the middle day. Away (without meeting postman), and only just in time for train. Found fly waiting, and after a pleasant drive arrived before half-ten at the house, and was warmly greeted by one after another of the kind inmates. Dr. M— was from home, but Lady D—, etc., all came in one after the other. Mr. Th— came in early in the morning, but the meeting was a very constrained one. I coloured much, and the eyes of the party were keenly fixed on me. Mr. Th— stood about without daring to speak much, and I became nearly silent. . . . Chatted with Captain D—, and strolled round garden with him and Atty. Saw Mr. Th— and Mr. B— strolling, but over the hedge, and did not say many words, though I

1858.

June 14, 15, 16,
21; Nov. 26.

ROBINSON

v.
ROBINSON AND
LANE.

1858. " rather wondered that he avoided me, or rather did not seek
 June 14, 15, 16, " me. Dressed and sat down to dinner about half-one, near
 21; Nov. 26. " Mrs. O— and Mrs. K—; Mr. Th— opposite, and never
 ROBINSON " once spoke or looked at me. . . . After spending some
 v. " time in Lady D—'s room, I went out, passed through the
 ROBINSON AND " billiard-room, and saw Mr. Th—, who instantly left his
 LANE. " game, and seeing I was alone, came eagerly out with me.
 " Went to greenhouse, as it rained; sat awhile, and chatted
 " earnestly of his interview with Mrs. R—. He had written
 " (I found on my arrival, but the letter never reached me till
 " Wednesday), but he said nothing about it, and had to tell
 " me how she received him. . . . I went then to orangery,
 " and he got me a chair and sat down, but at great distance.
 " We talked very earnestly, but rather hurriedly and con-
 " fusedly, and not of the things which were uppermost. . . .
 " I do not know whether he is really more silent than usual,
 " but he was certainly strangely quiet; nevertheless, the
 " knowledge that I was understood, and that he really liked
 " to be with me, gave me much interest in the walk. . . .
 " Dr. Lane had taken tea and was out walking; however, I
 " was not long done tea when his wife called him, and he
 " came bounding in through the open window to greet me, with
 " more warmth than I even expected. Very warmly he shook
 " hands; very cordially he sat down quite near me, and asked
 " many questions as to my welfare. Mr. Th— sat opposite
 " and seemed to be reading, but I know watched all that
 " passed. . . . Dr. Lane was in the highest spirits; seated
 " himself on the sofa I had chosen near the piano, and only
 " left me to sing occasionally, and to speak a few words to
 " his guests; but his eyes, his whole attention, his talk, was
 " all mine from that time till 11. We spoke of love, of
 " poetry, of his age, and I told him he had never looked
 " better, although he declared he felt quite old; we spoke of
 " music and his songs; he sang sweetly and with enjoyment
 " both a French and a comic song, and several others, includ-
 " ing one I asked for, 'Oh, the heart is a free and fetterless
 " thing.' Miss B—s and the clergyman left at 10, and Mr.
 " Th— went away too to walk with them home. He had
 " been sitting not far from us all the evening, but had hardly
 " moved, or spoken, or looked up. Mrs. K— alone ad-

"dressed him for a little time; and yet I knew that he
 "watched us and felt our presence. Once he came up for
 "a moment, knelt as Mr. L— had just been doing, and
 "stood at my feet, and I spoke of Sydenham, and advised
 "him to write circulars of his intended school. He looked
 "bright and happy while I spoke, but on coming back later
 "in the evening, he seated himself near the door, and was
 "pale, wan, and spiritless as before. Many more songs were
 "sung, especially one from 'Orpheus,' with the refrain of
 "'Eurydice' in it, and I asked Dr. L— to read Pope's Ode
 "on 'Music,' which he did the last thing, very sweetly, to
 "my no small delight. After this and a few more jokes and
 "compliments, we separated, and I know not that I ever
 "more enjoyed an evening. All headache was gone, all sense
 "of sorrow; the old enchantment in that fascinating society
 "was coming back upon me, and I felt that no one could
 "compete in attraction with the handsome, graceful, lively,
 "charming L—. *His little wife took me to my room so
 "sweet, so kind, so unsuspecting.* He too looked in, and then
 "they left me, but not to sleep; the bed was hard, and my
 "spirits were far too much excited for sleep. I laid and
 "turned till morning, and then it was late."

1858.

June 14, 15, 16,
21; Nov. 26.

ROBINSON

v.

ROBINSON AND
LANE.

"11th (*Reading*).—Fair part of day, rain in night. Up at
 "7, and rather less sad. Henry to Caversham after break-
 "fast. I busy in house. Miss S— with boys. Wrote to
 "Mr. Th—. Out at 1 and saw her, and gave leave for boys
 "to go with her tomorrow. Paid butcher, who had made
 "mistake in bill, and to Caversham. Much wearied and did
 "not enjoy it. Sat and mused sadly in house. Back after
 "7. Unpacked and attended to affairs. Henry cross, both
 "then and later. Letter Mr. Th— this day at 2, to express
 "his deep regret at my altered looks and illness, and to tell
 "me that he was getting well and had hopes of Sydenham.
 "It was short and somewhat unsatisfactory; not a remark
 "about any former letters of mine; not an acknowledgment
 "for anything. Each letter breathed less interest than the
 "last. It was well. I must learn to let him too join the
 "company who could live without me; he would make and
 "find friends, and would never be lonely again. It was cool
 "friendship now on his part. Had it ever been more? I

1858. "thought not; and was thus again punished, as oft before,
 June 14, 15, 16, "for over-adhesiveness, for love of approbation and excita-
 21; Nov. 26. "bility. When I shall be calm, cold, tranquil, praiseworthy?
 "Never."

ROBINSON
 v.
 ROBINSON AND
 LANE.

"15th.—. . . Wrote out passages from 'Athenæum,' and
 "read it at 1 in the garden, under that tree that I never see
 "without thinking of my escapade with Mr. Th—."

"7th (October, Moor Park).—Fine, sunny, warm, genial
 "day, almost like the former month. Dr. L— asked me to
 "walk with him, but I thought he only meant politeness,
 "and I went to nursery and stayed with my little pets more
 "than an hour. He met me there at last, reproached me
 "for not coming, and bade me come away. I still lingered,
 "but at last joined him, and he led me away and alone to
 "our favourite haunts, taking a wider range and a more
 "secluded path. At last I asked to rest, and we sat on plaid
 "and read 'Athenæums,' chatting meanwhile. *There was*
 "*something unusual in his manner, something softer than*
 "*usual in his tone and eye; but I knew not what it proceeded*
 "*from, and chatted gaily, leading the conversation in talking*
 "of Goethe, of women's dress, and of what was becoming or
 "suitable. We walked on and again seated ourselves in a
 "glade of surpassing beauty. The sun shone warmly down
 "upon us; the fern, yellow and brown, was stretched away
 "beneath us; fine old trees in groups adorned the near
 "ground; and far away gleamed the blue hills. *I gave*
 "*myself up to enjoyment; I leaned back against some firm*
 "*dry heather bushes, and laughed and remarked as I rarely*
 "*did in that presence. All at once, just as I was joking my*
 "*companion on his want of memory, he leaned over me and*
 "*exclaimed, 'If you say that again, I will kiss you.'* You
 "may believe I made no opposition, for had I not dreamed of
 "him and of this full many a time before. *What followed, I*
 "*hardly remember;—passionate kisses, whispered words, con-*
 "*fessions of the past. Oh, God! I had never hoped to see*
 "*this hour, or to have my part of love returned! Yet so it*
 "*was. He was nervous and confused, and eager as myself.*
 "*At last we roused ourselves and walked on; happy, fearful,*
 "*almost silent, we sauntered, not heeding where, to a grove of*
 "*pinces, and there looked over another view, beautiful as that*

"on this side, but wilder. In descending, we had seen the
 "Browns, and now thought it necessary slowly to join them
 "They had observed nothing; we were safe. Constraining
 "ourselves to converse, we succeeded in disarming all sus-
 "picion, and reached the house together, but late for dinner."

1858.

June 14, 15, 16,
21; Nov. 26.ROBINSON
v.
ROBINSON AND
LANE.

"8th.— . . . I laid down wearied, exhausted, nervous;
 "he tapped at half-past 12 and bade me come out and walk,
 "but I refused and dozed on. Mrs. L— came in, when I
 "dressed and slowly went out to him; he joined me at the
 "foot of the stairs and we sauntered out together, walking all
 "round the grounds and by water, yet saying little to one
 "another, for both were weary and feeble. I named my not
 "having slept; he said he was in pain and could hardly get on
 "at all. Both were agitated, confused, and nervous, and I
 "asked him how it was he had acted as he did on Sunday; at
 "last I proposed leaving the grounds, as the air was hot and
 "moist, and getting a breeze on the hill; we climbed it slowly,
 "and I rested among the dry fern. I shall not state what fol-
 "lowed. We rose soon, more composed and cheerful, and we
 "went home quickly, fearful of being too late; the dinner was
 "cheerful enough, and I talked all I could to Lady D—, for
 "there were few persons present, and turned from him, leav-
 "ing him to talk to Miss T."

"10th.— . . . Walking through paths that I had never
 "seen before of the greatest beauty, reaching the outer pine
 "wood and finally returning by Swift's cottage and lower
 "walk, we talked with the utmost confidence, but somewhat
 "more calmly. I entreated him to believe that since my mar-
 "riage I had never before once in the smallest degree trans-
 "gressed; he consoled me for what I had done now and con-
 "jured me to forgive myself; he said he had always liked me,
 "and had thought with pity of my being thrown away, as my
 "husband was evidently unsuited to me, and was, as he could
 "plainly see, violent tempered and unamiable; then we spoke
 "of his early age, 31; his marriage, the sweet, unsuspecting
 "character of his wife, rather than pain whom he would cut
 "off his right hand, and when just discussing my often bitter
 "misery and wish for death—my former life and fortune,
 "when we were met by Lady D— and her daughter, who
 "were anxiously awaiting my decision about a fly . . . they
 "kindly received my determination to go away about 7, and

1858. "went off again without one cold or displeased look, and yet
 June 14, 15, 16, "we were walking arm-in-arm through those lonely woods
 21; Nov. 26. "and talking how earnestly. . . . We drove off, Alfred soon
 ROBINSON "taking place on the box. *I never spent so blessed an hour*
 v. "as the one that followed, full of such bliss that I could will-
 ROBINSON AND "ingly have died not to wake out of it again. . . . I remem-
 LANE. "bered him of my lines from 'Paul and Virginia,' and owned
 "they were addressed to him. *I shall not relate ALL that*
 "passed, suffice it to say that I leaned back at last in silent
 "joy in those arms I had so often dreamed of, and kissed the
 "curls and smooth face so radiant with beauty that had daz-
 "zled my outward and inward vision since the first interview,
 "15th November, 1850. He had always known I had liked
 "him, but not the full extent of the feeling, and owned it had
 "never been indelicately expressed; this relieved me. *Hea-*
 "ven itself could not be more blessed than those moments; while
 "life itself shall endure their remembrance will not pass away
 "from a memory charged with much suffering and little bliss;
 "how gentle, how gentlemanly he was—how little selfish!"
 "29th (January, 1855, Boulogne).— . . . Up 8, not very
 "well, dream of early home, brother Tom, mother young,
 "father, walking in garden with her with the old affection;
 "at what a strange waking up; all that had passed 30 years
 "ago. I was in middle life myself, my mother old and bro-
 "ken, my father in the grave, my own children growing up,
 "it was my turn to go next, a few more suns would see me
 "decrepit and dying, I must quit this pleasing, anxious being,
 "never fathom life's great mystery and become as though I
 "had never been—my thoughts, my love, my dreamings,
 "turned to clay! O God! what hollow mockery seemed the
 "gift of life—how I wished that my work were done and that
 "I could lay it down; it had not been to me a blessing, my
 "youth was blighted by the bigotry and ignorance and want
 "of thought of those who had the charge of my bringing up.
 "The headstrong passion of my more advanced days led me
 "to form two marriages, both of them miserable, and now,
 "alas! late in the day, I mourn over errors that I am unable
 "to overcome; my soul is clouded by remorse and bitterness,
 "and I strive with but faint hopes of success to bring up my
 "three sons, who (with all my love for them) ought to be in
 "better hands. The past a desert, the present thorny, the

"future horrible; eternity a blank, what a dreadful fate is mine!" 1858.
 June 14, 15, 16,
 21; Nov. 26.

"28th (February).— . . . Dreamt very painfully of a final walk with Dr. L—, of an anguished parting, of a *discovery* and *wandering* in shame and wretchedness in the world; woke (1st of March) alarmed and miserable, and had headache all day. 'I never loved any one as I did thee, both mind and body,' I had said in my dream, and in my waking moments the same idea was breathed still in my ear." ROBINSON
 v.
 ROBINSON AND
 LANE.

"9th (April, Boulogne).— . . . He (M.L.P., French tutor) corrected a little more of my exercise and did not leave me till 12; there was something very gentle and almost cheerful in his manner, and he said they had enjoyed yesterday afternoon. He looked better than usual, and I found that with my usual clingingness of disposition I was beginning to think more of his presence and approbation than conduced to my peace. Foolish heart, ever thus giving away its interest and regard for those who care not one iota about thee further than their interest is concerned."

"27th (April, Boulogne).— . . . Wrote nice, long, but rather sad letter to Dr. L—, to whom I cling very warmly, and whose sweet, mournful little note quite made amends for past silence."

"9th (June, Boulogne).— . . . He took lesson, and I came in afterwards. We did some of the translation and he stayed late to finish it, but we had so much to say of Mr. Gretton and religion, music, etc., that the time flew by; he was very gay and friendly, and owned that he should miss us sadly. I felt this was more likely to be my case than his. The utter frigidity of his conduct rather surprises me: others (handsomer than he is) have found attraction in my company, and where I have shown so much and unvarying kindness as I have to him, and where gratitude is evidently felt, it is a marvel that a warmer feeling does not sometimes come uppermost. Temperaments most widely differ; and after all it is happy every way that he has this moderation."

"21st (June, to Moor Park).— . . . Got to Moor Park in time for tea; were kindly welcomed. Dr. L— came in late and looked pleased to see me; I went with him to see sunset, and reached the hill in time to see it. How often had I wished to see it with him, but now he was ill, cold,

1858. "low, and sad, and could not enjoy it; into garden, sat in
June 14, 15, 16, "*bower, renewed the love of old times, but not so excitingly.*
21; Nov. 26. "Home, and sat in his room with him till 10."

ROBINSON "24th.— . . . We all strolled off at last in the direction
of the well. Dr. L— sat chatting with me on a seat near it,
ROBINSON AND "and at length took me alone up the very *valley where we*
LANE. "*had first enjoyed the happiness* of loving, changed now and
"so was he, and we talked only commonplace."

"25th.— . . . He came round and sat by me, and at
length brought a book of old songs and sat very near me
looking them over. We went out to walk, sat in our pri-
vate bower, read Béranger's 'Bon Dieu,' and talked of his
health and prospects, but he was cold and mentally sad. It
was the shrine of the idol I had once worshiped that was
left to me, but it was enough for my woman's heart; walked
with him till dark, looked at his prints in the study, parted
with him at 4, *after one long, passionate, clinging embrace,*
and left him at last much excited. Dreamed of him all
night, and longed and mused and glowed."

"10th (October, Moor Park).— . . . I begged a thousand
pardons and said how much I regretted it; I must have
written it in a perverse mood, I said. It was all over now,
he replied, and we parted with one of those long, caressing
kisses that shake my very soul, and make me dream and
long for hours."

"14th (Ditto).— . . . It was 11 o'clock ere the latter rose
to go. Mrs. R— had sat uneasily behind us on the sofa,
too deaf to hear and unwilling to go; the two went after 11,
and the Dr. after talking some little time appeared to re-
turn to his former kind feeling for me, caressed and tempted
me, and finally, after some delay, we adjourned to the next
room and *spent a quarter of an hour in blissful excitement.*
I became nearly helpless with the effects of his presence
and could hardly let him depart, *wept when he bade me try to*
obviate consequences, and finally bade him a passionate fare-
well. I was alone, passion wasted, and sorrowful, sleep was
far from me that night; I tossed and dreamed and burned
till morning, too weary and weak to rise."

"15th.— . . . The Dr. came to my room and sat a long
while talking coldly of life, reputation, chances, caution, and
my partner. I cut a lock off his fine hair, said how much I

1858.

June 14, 15, 16,
21; Nov. 26.

" had always loved him, spoke of his love-telling eyes and fine
 " face and mouth; still he moved not; the interview closed
 " without even a kiss. I saw that, though I might have
 " caused momentary passion, I was not wholly beloved, but
 " that regard for reputation and ease were the moving springs
 " of his conduct."

ROBINSON
 v.
 ROBINSON AND
 LANE.

" 30th (December, Boulogne).— . . . After tea Henry com-
 " menced a most unpleasant discussion; accused me of some
 " intimacy with the Le P— family, of which he could not
 " ascertain the extent; said he was aware of my writing and
 " posting and receiving letters that he knew nothing about;
 " and altogether showed such suspicion and ill-feeling, that I
 " was alarmed and truly distressed. I said all I could to
 " disarm suspicion, and to appear to stand firm under this
 " blame, deserved, as I could not help feeling it, and yet
 " excused by the harsh, narrow spirit of my partner. We
 " did not separate till after 12, and I had headache and
 " nervous agitation. He seemed sorry at the consequence of
 " this stormy altercation, and said many conciliatory things.
 " It was too late then. Love, respect, complacency, friend-
 " ship, patience, were all gone; nothing on my part remained
 " but dread, weariness, disgust, and constraint. It is my
 " children alone that keep me; once they leave the parental
 " roof, and I will quit him."

The case for the petitioner was proceeded with and closed
 on the 14th. On the 15th, at the sitting of the Court,

Mr. Forsyth, Q.C., proceeded to address the Court for
Dr. Lane, the co-respondent.

By the Court: *Dr. Phillimore* is counsel for the wife, and
 the question arises, whether he should not be the first to ad-
 dress the Court? His is the primary case. We presume
 that the intention of the Act in allowing the co-respondent to
 appear, is to enable him to protect his character from any
 charges that may be brought against him in these proceedings.

Dr. Phillimore, Q.C., intimated that it was in consequence
 of an arrangement between *Mr. Forsyth* and himself that the
 counsel for the co-respondent proposed to address the Court
 first.

1858. COCKBURN, C.J.: I don't see any reason why, if an arrangement has been entered into between the counsel for the respondent and the counsel for the co-respondent that the counsel for the latter should first address the Court, we should interfere; otherwise, as the counsel for the wife appears for the primary party, and the counsel for the co-respondent only for the secondary party in the suit, the wife's counsel should begin.

June 14, 15, 16, 21; Nov. 26.
 ROBINSON
 v.
 ROBINSON AND
 LANE.

Auguste Giet, a butler in the service of Dr. Lane, was sworn and examined on behalf of the co-respondent. He stated that he had never observed any improper familiarity between Dr. Lane and Mrs. Robinson, and gave evidence to discredit that of Levi Warren.

Dr. Phillimore, Q.C., proposed to cross-examine the witness.

BY THE COURT: You have identified yourself with the co-respondent, and you cannot now cross-examine his witness. You may ask him questions, but do not put them in a leading form.

Lady Drysdale (Mrs. Lane's mother), Mrs. Suckling, and Dr. M. Richardson, who had been patients at Moor Park, deposed that they had never seen acts of improper familiarity between Dr. Lane and Mrs. Robinson, and that there was nothing in his conduct towards her at all different from his conduct towards other ladies.

Mr. Coleridge summed up on behalf of Dr. Lane.

Dr. Phillimore opened the case on the part of Mrs. Robinson. She was charged with adultery with one person only, and the evidence failed to establish that that person had been guilty of adultery. Would it be reasonable to declare Dr. Lane innocent of the charge, to dismiss him from the suit, and at the same time to divorce Mrs. Robinson on the ground that she had committed adultery with him?

COCKBURN, C.J.: Suppose the case of a wife, who confessed that she had committed adultery with a person, who was in reality innocent, in order to conceal her real paramour: you would not compel a husband to keep such a wife?

Dr. Phillimore: The petitioner does not charge adultery with any one but Dr. Lane, and therefore by Dr. Lane's innocence or guilt she must stand or fall. 1858. June 14, 15, 16.

THE JUDGE ORDINARY: If Dr. Lane had not been a party to the suit, the wife's confession would have been evidence against her. How can the circumstance of his being before the Court make it no evidence against her?

ROBINSON
v.
ROBINSON AND
LANE.

WHITEMAN, J.: If each party had made separate confessions, the argument would go to the extent of excluding both confessions.

Dr. Phillimore proceeded to point out that by the oral evidence no proximate act whatever was proved. He then referred to the fallacious character of confessions made in journals as compared with other confessions. For instance, the journals of Horace Walpole contained many statements which, as had since been proved, he must have known to be false when they were written. The journal before the Court had evidently been written by a woman of so flighty, extravagant, excitable, romantic, and irritable a mind, as almost to amount to insanity. He read several of the extracts from her diary (see *ante*, p. 365 *et seq.*), consisting of self-accusations; of records of conversations on various subjects with Dr. Lane and others; of her opinions on poetry, phrenology, and other matters, and containing expressions of a disbelief in a future state. He should contend that the passages relied on for the petitioner were written under the influence of an uterine disease, which had the effect of producing the most extraordinary delusions on the mind of the patient, and frequently caused them to accuse themselves of crimes of the most horrible kind. There were entries in the diary relating to her sufferings from this disease, and for which she had consulted and had been treated by medical men.

Dr. Joseph Kidd, M.D., who had been her medical attendant from 1849 to 1856, was examined. He described the symptoms under which she had suffered during his attendance on her, and stated that her mind alternated between excitement and depression. Her symptoms were referable to ute-

1858. rine disease; he did not refer them to it at the time, but from
 June 14, 15, 16. the statements in the diary, he thought they might be attri-
 buted to this cause. He was not prepared to state that she
 had suffered from 'nymphomania' or 'erotomania' since 1852.
 Since that time she had not been so directly his patient.

ROBINSON
 v.
 ROBINSON AND
 LANE.

Sir Charles Locock, M.D., Dr. Bennet, M.D., and Dr. Forbes Winslow, M.D., were examined as to the effect of the uterine diseases, 'nymphomania' and 'erotomania,' in producing extraordinary delusions in the mind of the patient. The disease called 'nymphomania' was a local disease, and the other, 'erotomania,' had its origin in the brain. Both these forms of uterine disease might produce the same results—a morbid condition of the mind on sexual subjects. Instances were mentioned by them of ladies, whilst affected by one or other of them, accusing themselves, without the slightest foundation, of the most flagrant acts of unchastity.

Dr. Phillimore, Q.C., proposed to examine Dr. Lane, the co-respondent, as a witness on behalf of Mrs. Robinson.

COCKBURN, C.J. : This is a proceeding instituted on account of adultery ; Dr. Lane is a party to the suit ; is it competent for him to be examined as a witness ?

THE JUDGE ORDINARY : By 14 & 15 Vict. c. 99, the parties to a suit are made competent and compellable to give evidence in the suit ; but the 4th section enacts, that nothing therein contained shall apply to any action, suit, proceeding, or bill, in any Court of common law, or in any Ecclesiastical Court, or in either House of Parliament, instituted in consequence of adultery, etc. The 16 & 17 Vict. c. 83, makes the husbands and wives of the parties to a suit competent and compellable to give evidence, but does not affect the above exception.

Dr. Phillimore, Q.C. : It was said by the Lord Chief Justice yesterday, that it never could have been the intention of the Legislature to place persons by this Act in a worse position as to evidence than they were before. This witness might have been examined in proceedings in the Ecclesiastical

Courts under the general law; if he cannot now be examined, the wife is deprived of a mode of defence which she had before the Act. The exception in sect. 4 of 14 & 15 Vict. c. 99, is grafted on the 2nd section, which would not have applied to a person in the position of the co-respondent.

1858.

June 14, 15, 16.

ROBINSON
v.
ROBINSON AND
LANE.

COCKBURN, C. J.: The Divorce Act simply alters the law by directing that every adulterer shall be made a co-respondent. If the Legislature puts a party in a position to which the existing law clearly applies, it must be applied to him. By the law, at the period of the passing of the Divorce Act, no party, whether he was *actor* or *reus*, could be a witness in a suit instituted in consequence of adultery. Then comes the Divorce Act, which places the adulterer in this position, namely, as a party to the suit. It appears to me that sect. 4 of 14 & 15 Vict. c. 99, must be applied to him, and that he cannot be a witness.

WIGHTMAN, J.: He is joined in this suit *diverso intuitu*, not for adultery but for damages.

COCKBURN, C. J.: Dr. Phillimore would contend that there are two suits.

THE JUDGE ORDINARY: There is no petition for damages.

BY THE COURT: Suppose, Dr. Phillimore, you were to apply to the Court to dismiss Dr. Lane as co-respondent, and we were to do so, he might then be examined.

Dr. Addams, Q.C., *contrà*.

BY THE COURT: It is frequently done in criminal and sometimes in civil matters. In actions of trespass, one of the defendants under the old state of the law was dismissed from the record and examined as a witness. Dr. Lane is not a defendant in the process of divorce. If you had applied to the Court to leave him out as co-respondent, and it had done so, the other side could have called him as a witness.

Cur. adv. vult.

1858.

June 16.

ROBINSON
v.
ROBINSON AND
LANE.

COCKBURN, C. J.: In this case we have considered the question raised yesterday as to the competency of the co-respondent as a witness on behalf of Mrs. Robinson, and we are clearly of opinion that, on the true construction of the Evidence Act, 14 & 15 Vict. c. 99, and of the Divorce Act, that the co-respondent is not a competent witness. But here arises a grave question; whether, it being admitted that there is no evidence to affect Dr. Lane independent of the confession of Mrs. Robinson (taking it for the purposes of the present argument that her diary amounts to a confession), we ought not, if we can, *ex debito justitiæ*, to dismiss the suit as far as regards Dr. Lane, and thereby render him a competent witness for Mrs. Robinson. That question involves such grave consequences and such serious principles as regards the administration of justice under the Divorce Act, that we are anxious to have the assistance of all the members of the Court before making a precedent. We adjourn the case till Monday, when we hope to be able to state the conclusion at which we may have arrived.

If there are any other witnesses on the part of the respondent, their evidence could be taken before the adjournment.

Dr. Phillimore then called :

Mr. Thom, who said that he was a gentleman connected with literature, and knew Mr. and Mrs. Robinson,—the latter intimately. He became acquainted with them at Reading, in 1854, and afterwards met Mrs. Robinson at Moor Park. She was a very excitable person. There was a certain amount of formality in her general behaviour, but she now and then uttered romantic and flighty observations. The witness read an entry in Mrs. Robinson's journal, containing an account of an interview with him on the 3rd of June, 1854. She described him as looking "thin, pale, worn, agitated, hopeless," said that his "great eyes looked like pale violets, his cheeks were hollow, and there was a look of intense dejection about his whole person." Her own cheeks, she added, "were flushed, tears came every second into her eyes, her voice was choked, and they talked long and earnestly." This account, the witness said, was highly coloured and exaggerated, and he was not in a state of dejection or depression.

The witness's attention was called to another entry of the 4th of July, 1854, respecting another interview, to which the same observation applied. On the 15th of July there was an entry in which occurred the words, "In the garden under that tree, which I never see without thinking of my escapade with Mr. Th." The word "escapade," the witness said, was inexplicable to him. He remembered one day that he was reading under a tree in the garden with Mrs. Robinson, when Mr. Robinson approached, and Mrs. Robinson then ran round a corner, in order apparently to keep out of her husband's way. Mr. Thom distinctly denied that any kind of impropriety had ever passed between Mrs. Robinson and himself, and characterized the entries in the diary relating to himself as romantic and rhapsodical.

On cross-examination, he said that he had acted for a short time as tutor to Mr. Robinson's children, and had been by him introduced to Dr. Lane, with whom he had since remained upon terms of intimacy.

1858.
June 16, 21.
ROBINSON
v.
ROBINSON AND
LANE.

COCKBURN, C. J. : In this case we adjourned the proceedings in order that we might have the assistance of the other members of the Court in determining the questions which were submitted to our consideration as to the admission of Dr. Lane, the co-respondent, as a witness on behalf of Mrs. Robinson. It was said, in the first place, that Dr. Lane, although a co-respondent, was nevertheless a competent witness, and upon the Court expressing an opinion that he was not a competent witness, a second proposition was then submitted to us. We were asked, it being clear that there was no evidence against Dr. Lane, to allow him to be dismissed from the suit in order to qualify him as a witness. Upon the first question, we had no difficulty in arriving at the conclusion that Dr. Lane, as a co-respondent, was not a competent witness under the 14 & 15 Vict. c. 99, because he was a party to a suit instituted in consequence of adultery. With regard to the second question, it was one of so much importance that we have obtained the valuable assistance of Lord Campbell, of the Lord Chief Baron, and of Mr. Justice Vaughan Williams, in determining it. Those learned judges agree with my brother Creswell and myself in thinking that we cannot accede

June 21.

1858.

June 21.

ROBINSON
v.ROBINSON AND
LANE.

to the proposition that has been made to us to dismiss Dr. Lane from the suit in order to render him a competent witness. We regret that our brother Wightman, for whose opinion we entertain an unfeigned respect, has formed a different opinion. The grounds on which we have formed our opinion are these:—The Divorce Act expressly provides that the alleged adulterer shall, upon every petition founded on adultery, be made a co-respondent, unless on special grounds the Court shall think proper to excuse the petitioner from making him a co-respondent. It appears to us that this provision is imperative in a case where, at the outset, the petitioner has not, upon application to the Court, been relieved from making the adulterer a co-respondent. No such application was made at the outset of these proceedings on the part of the petitioner, and we apprehend that the alleged adulterer is, therefore, a necessary party to the suit, not only in its inception, but throughout its continuance, until final sentence is pronounced. We apprehend that we cannot take upon ourselves, without the consent of Mr. Robinson, to dismiss Dr. Lane from the record, but that he must wait out the termination of these proceedings. It is not for us to speculate on what may have been the intention of the Legislature in making this provision, or to inquire whether further legislation on the subject would be desirable; but we must interpret and administer the Act as we find it, to the best of our ability. The object of the Legislature was probably not confined to enabling the alleged adulterer to defend himself from a demand for damages and costs, because it was not left to the discretion of the petitioner to make him a co-respondent. It was probably intended to enable a person whose conduct and character were involved in a proceeding not directed immediately against himself, to defend himself by counsel and witnesses. We cannot find anywhere that a power and discretion is given to the Court, directly or indirectly, to dismiss a person from a suit who is by the Act expressly made a party to it. We have been asked to dismiss Dr. Lane *ex debito justitiæ*, in order that injustice may not be done, but we do not think we should be justified in doing what is contrary to a clear and intelligible rule laid down by positive enactment. Believing that we have no power to dismiss Dr. Lane from

the suit until we finally pronounce judgment, it is unnecessary to express any opinion as to whether this is a case in which we ought to exercise that power if we possessed it.

1858.

June 21.

ROBINSON

v.

ROBINSON AND
LANE.

WIGHTMAN, J. : I regret that I have arrived at a different conclusion from the rest of the Court. It may be assumed that there is no evidence against Dr. Lane, and the Divorce Act contains no provision whatever applicable to a case like the present. Before the passing of the Act, the alleged adulterer would have been a competent witness for the wife, both in the Ecclesiastical Courts and in the House of Lords. Then by the Act the proceedings against the wife and the alleged adulterer are not similar, and the Court may make different orders with regard to each of them. In the event of a co-respondent claiming a trial by a jury, and obtaining a verdict, would the Court be precluded from dismissing him until it pronounced its final sentence? It is not absolutely necessary that there should be a co-respondent, and I find nothing in the statute to satisfy me that the Court has no power to dismiss the co-respondent in the course of the suit. In this most extraordinary and peculiar case, Dr. Lane is the only person who could be called to contradict the entries in the journal. If the Court has no power to dismiss him, a wife might be precluded from having the benefit of the testimony of a person against whom there was not a tittle of evidence, by his being made a co-respondent. Not believing that the Legislature intended the Divorce Act to have that effect, I am of opinion that Dr. Lane ought to be dismissed from the suit, and admitted as a witness.

THE JUDGE ORDINARY : I agree with the opinion expressed by the Lord Chief Justice. I wish to state that I have formed my opinion simply upon a consideration of the statute, and without reference to any of the evidence given in the cause.

COCKBURN, C.J. : I have now to state that, since the last hearing of this case, considerable doubts have suggested themselves to certain members of the Court as to the propriety of the decision at which we then arrived in refusing to

July 3.

1858. accede to the prayer of Mrs. Robinson's counsel to dismiss
 July 3; Nov. 26. the co-respondent, and thereby make him a competent witness. They have a strong impression that justice to a man placed in Dr. Lane's position requires, that if no case is made out against the co-respondent, he should be discharged from the suit, and enabled to give evidence on what is specially within his own knowledge. In these doubts I, having been one of the majority on the former occasion, think it right to say I now concur. It has since come to our knowledge that it is intended to introduce a clause in a Bill now before Parliament to solve this doubt, and to enable the Court, if it does not already possess the power, to dismiss a co-respondent and make him an admissible witness. It is probable that this clause will apply to pending suits; if so, we shall be too glad to avail ourselves of it in the present case. Even if such a clause should not become law, I for one should think it incumbent on the Court to reconsider the conclusion at which it had arrived, and that as matters now stand, the interests of justice do require that Dr. Lane, against whom no case is established, should be dismissed from the suit. We adjourn the case for further consideration.

ROBINSON
 v.
 ROBINSON AND
 LANE.

In the meantime a clause was inserted in the Divorce Amendment Act (1858) to meet the supposed hardship of the present and similar cases, whereby the Court is authorized, in its discretion, to dismiss the co-respondent from a suit, so as to make him a competent witness.

November 26. The Court accordingly exercised the power given it by 21 & 22 Vict. c. 108, s. 11: "In all cases now pending or hereafter to be commenced, in which, on the petition of the husband for a divorce, the alleged adulterer is made a co-respondent, or in which, on the petition of the wife, the person with whom the husband is alleged to have committed adultery is made a respondent, it shall be lawful for the Court, after the close of the evidence on the part of the petitioner, to direct such co-respondent or respondent to be dismissed from the suit, if it shall think there is not sufficient evidence against him or her;"—and on 26th November, 1858, dismissed Dr. Lane from the suit. He was then examined on behalf of Mrs. Robinson. He denied all criminal

or indecent conduct; said that as she was an old friend, he was more attentive to her when at Moor Park than to strangers; and on the occasion of her coming there in October, 1855, he, in consequence of some kindness of hers towards his children, received her in the hall, in the presence of his mother-in-law and other persons, with a kiss.

1858.
November 26.
—
ROBINSON
v.
ROBINSON.

Mr. Bovill, Q.C., summed up the respondent's case. The case for the petitioner must be taken to stand entirely on the entries in the diary. The attempt to produce evidence independent of those entries had failed. The diary contained no explicit statement of Mrs. Robinson's guilt. It was proved, on the evidence of some of the most eminent medical men in the kingdom, that the disease under which she was labouring was likely to excite her imagination, and cause her to imagine that to have occurred which had never taken place. The fact that she suffered for several years from that disease was proved, and the means taken by her and her husband to prevent conception tended to aggravate that disease. It was manifest, from page after page of the diary, that she was under the influence of painful feelings with regard to her husband.

Their Lordships would remark that she frequently appeared to be struck with Shelley's writings, and it was natural to infer that she had also been struck with events in Shelley's life, and with the fact that he had imagined things which never existed. They would also observe that she sometimes addressed herself to a reader, as if her confessions, like those of Rousseau, were intended for the perusal of some one after her death. She wrote on one occasion: "Reader, you see my inmost soul. You must despise and hate me. Do you also pause to pity? No; for when you read these pages all will be over with one who was too flexible for virtue, too virtuous to make a proud, successful villain. Good night! "May you be more happy!" The account of the interviews with Mr. Thom were so much exaggerated, that they might be regarded as purely imaginative. The entries with regard to Dr. Lane and Mr. Thom were of the same description—they were not records of facts, but expressions of feelings.

1858. COCKBURN, C.J. : It is hardly fair to Mr. Thom to say that
November 26. he is referred to in the same terms as Dr. Lane.

ROBINSON
v.
ROBINSON.

(*Argument continued*).—The entry of October 7th, 1854, one of those upon which the petitioner relied, was written not on the day when the facts were supposed to have occurred, but on the following day, after a night of sleeplessness and dreaming. The entry itself, too, referred to dreams more than once. "He exclaimed, 'If you say that again I'll kiss you.' You may believe I made no opposition, for had I not dreamed of him and of this full many a time before?" Even setting aside Dr. Lane's contradiction, the journal itself was not evidence upon which the Court could safely dissolve a marriage. All these supposed criminalities were said to have occurred in places open to the public, where no sane person would have thought of committing them; that alone was a presumption against their truth. In cases of this kind the burden of proof was upon the husband; and, as there was no evidence but the diary, which was contradicted by Dr. Lane upon his oath, that proof had failed. The explanation of the journal was, that Mrs. Robinson's mind was quite unable to distinguish the real from the unreal. It was almost incredible that any woman should deliberately write a memorial of her own infamy. On these grounds he submitted that the case had failed against Mrs. Robinson, as well as against Dr. Lane.

Mr. Montagu Chambers, in reply, submitted that Mrs. Robinson having substantially admitted herself to be guilty of adultery, the Court could not, in accordance with any known principle of law, refuse the relief for which Mr. Robinson prayed. He denied that in the Ecclesiastical Courts it was ever held that adultery could not be proved without some corroborative evidence. There was, however, a canon which prevented the Court from acting on an uncorroborated confession, whatever might be its own moral conviction. The case he had now made out was a case of confession, supported not only by probabilities, but by certainties. The very journal showed that Mrs. Robinson was a sane woman, capable of discussing even the most abstruse and difficult questions. It was the journal of a very romantic,

but, nevertheless, of a very clever woman. The foundation of the defence was that Mrs. Robinson was labouring under a uterine disease, but that foundation was one of sand. No evidence was given as to her present state of health, or as to the time when her disease was supposed to have terminated. They did not even know precisely what was the disease with which she was afflicted. Dr. Kidd's evidence on that point by no means went to the extent that Mrs. Robinson, at the time when he was in attendance upon her, was suffering under the malady which was said by him and the other medical witnesses to give rise to sexual hallucinations. He only drew the inference that she had been suffering under that malady after reading the passages in the journal. But at the time when Dr. Kidd was attending her, there were no entries in the journals which could be called hallucinations. The journal itself, from first to last, contained no indications whatever of delusion. Conversations and other ordinary events were narrated in a detailed and truthful manner. In no point had his learned friends been able to contradict that journal, except by the evidence of Dr. Lane with regard to the material passages. Dr. Lane himself impliedly confirmed its accuracy in all but those points. Mrs. Robinson was in the position of a longing woman who had fallen in love with a handsome man, and who induced him, in a hapless moment, to yield to her solicitations. Not an error had been pointed out in the diary as to any matter of fact, although there were innumerable matters mentioned which might have been proved to be false. Exaggerated and highly coloured as the language was, it was nevertheless perfectly true. How was it that Dr. Lane was the only person with whom she accused herself of criminal intercourse? If this was all delusion, Dr. Lane was not the only man who would have been accused. Dr. Lane, as her journal stated, was for a long time, to his honour be it said, cold and reserved, and rejected her advances; but his demeanour in public was no contradiction of the charge of adultery. Unless Dr. Lane was a perfect Joseph, he must have fallen under the circumstances of temptation in which he was placed. If he had really come forward now to vindicate an innocent woman, what a pity it was that he did not think of doing so when Mr. Robinson

1858.

November 26.

 ROBINSON
 v.
 ROBINSON.

1858. commenced the suit in the Ecclesiastical Court. Having
November 26. heard that he was implicated, why did he remain silent? If
she had been innocent, she too would surely have communi-
cated with him. Dr. Lane's denial that he had committed
adultery was the only statement that it was possible for him
to make when called upon to vindicate the lady accused. He
was in a most difficult position; called upon both by his own
wife and by Mrs. Robinson to declare his innocence, the very
kindliness of nature to which Mrs. Robinson so often alluded
would induce him not to hesitate. The case was one of fright-
ful importance to Mr. Robinson. He left it in their Lord-
ships' hands as an ordinary case of a man much tempted, who
had not been able to resist temptation. *Cur. adv. vult.*

ROBINSON
v.
ROBINSON.

March 2. COCKBURN, C.J., delivered judgment: This was a suit for a
divorce *à vinculo*, on the ground of adultery. The case was
peculiar and remarkable in its character and circumstances.
The only evidence to support the case of the husband, the
petitioner, consisted of certain alleged admissions of the wife,
the respondent, without any corroborative evidence, direct or
indirect, to support them. Not but that, indeed, some evi-
dence by way of corroboration was offered; but it was not
only inconclusive, but so untrustworthy in its character, that
the Court was under the necessity of discarding it as alto-
gether undeserving of consideration. This being so, as the
admission of the wife could not be used to establish the
criminality of the co-respondent Dr. Lane, the Court felt
itself called upon, before the close of the case (an Act of
Parliament having been passed which removed all doubt as to
its authority to do so), to dismiss the suit against him, and to
confine the question for its decision to whether, by the admis-
sions of the principal respondent, the wife, a case of adultery
was made out which entitled the petitioner to the redress
which he seeks.

But on the dismissal of the suit as against Dr. Lane, a
question presented itself, whether, on the acquittal of the
co-respondent, the alleged adulterer, the suit against the
wife must not of necessity fail. The case of an indictment
against two persons for conspiracy suggested an apparent
analogy; and as, in such a case, a plea of guilty by the one,

if followed by the acquittal of the other, would not have supported a judgment of guilty against the delinquent confessing and pleading guilty, so it might be said that here, as the offence of adultery necessarily implied the joint delinquency of two, if one of the parties was acquitted, the other could not properly be condemned. We were however of opinion that a principle of so purely technical a nature should be confined to the cases in the criminal law in which it had hitherto been applied, and that it ought not to be extended to a proceeding in which the addition of the co-delinquent to the suit had been made compulsory by the Legislature with a view to his own protection, and in which but for this special provision of the Act of Parliament, the suit would have been against the wife alone. This difficulty in the way of the consideration of the case against the wife alone being removed, we proceed to consider the evidence as it affects her.

Now the evidence, as has been before observed, consists entirely of admissions made by the wife herself; and here a question presents itself, as to how far the admissions of a wife charged with adultery, unsupported by any confirmatory proof, can be acted upon as conclusive evidence on which to pronounce a divorce. If this Court had been a Court of purely ecclesiastical jurisdiction, the 105th canon, which prohibits the granting of a divorce on the sole and unsupported testimony of the wife, would have precluded us from acting on this evidence. But as this Court is not a Court of ecclesiastical jurisdiction, nor bound in cases of divorce *à vinculo* by rules of merely ecclesiastical authority, it is at liberty to act, and bound to act, on any evidence legally admissible, by which the fact of adultery is established; and if therefore there is evidence, not open to exception, of admissions of adultery by the principal respondent, it would be the duty of the Court to act on such admissions, although there might be a total absence of all other evidence to support them. No doubt the admissions of a wife unsupported by corroborative proof should be received with the utmost circumspection and caution; not only is the danger of collusion to be guarded against, but other sinister motives which might lead to the making of such admissions, if, though unsup-

1859.

March 2.

ROBINSON
v.
ROBINSON.

1859.
March 2.
ROBINSON
v.
ROBINSON.

ported, they could effect their purpose, are sufficient to render it the duty of the Court to proceed with the utmost caution in giving effect to statements of this kind ; the more so as it must always be borne in mind that the co-respondent, though not in a legal point of view interested in the result, inasmuch as from the absence of evidence available as against him, he is entitled to an acquittal, has yet, socially and morally, the deepest interest in the result. Nevertheless, if, after looking at the evidence with all the distrust and vigilance with which, as we have said, it ought to be regarded, the Court should come to the conclusion, first, that the evidence is trustworthy, secondly, that it amounts to a clear, distinct, and unequivocal admission of adultery, we have no hesitation in saying that the Court ought to act upon such evidence, and afford to the injured party the redress sought for. The admission of a party charged with a criminal or wrongful act has at all times, and in all systems of jurisprudence, been considered as most cogent and conclusive proof ; and if all doubt of its genuineness and sincerity be removed, we see no reason why such a confession should not, as against the party making it, have full effect given to it in cases like the present. With these preliminary observations as to the principles on which the Court should be prepared to deal with such a case, we proceed to consider the evidence before us. The case of the petitioner rests, as we have said, on certain admissions of the wife, which it is contended amount to a confession of adultery. These admissions are contained in a diary kept by Mrs. Robinson, and extending over a series of years ; the passages relied on by the petitioner occur in the years 1854 and 1855 ; but the diary from the beginning of 1849 to the end of 1855 was produced before us, and we have carefully gone over the whole, with a view to gain an insight into the mind and character of the writer, as necessary to a due appreciation of the case. Abundant materials for this purpose are supplied by this remarkable journal : not only are all the events of the life, social and domestic, of Mrs. Robinson chronicled with minute detail, but her inmost thoughts and feelings, even where one would most have expected secrecy, are set forth without hesitation or reserve. We see before us a woman of more than ordinary intelligence and of no

inconsiderable attainments, but in whom sound sense and judgment were wanting to correct a too vivid imagination and too ardent passions. This is more particularly the case in all that relates to her intercourse with the opposite sex : the most commonplace attentions are invested by her flighty imagination with the character of romance and passion, to be followed in more sober moods by complaints of disappointment and confessions of her own folly in thus dwelling on delusions and dreams. We learn from her that her impatience of celibacy had twice hurried her into rash and ill-advised marriages, from which unhappiness only had resulted. Her second and present husband, Mr. Robinson, she had never loved, and at the period with which we have to deal, had ceased to respect : she dwells continually on the uncongeniality of his nature, and on the many points in which his temper and character were repugnant to her own ; and finally concludes by declaring that but for her children (for whom she appears to have had great and sincere affection) she should certainly quit him altogether. In the autumn of 1850 Mr. and Mrs. Robinson, being at Edinburgh, made the acquaintance of Mr. (afterwards Dr.) Lane and his wife, an acquaintance which speedily ripened into a closer intimacy. Mrs. Robinson appears from the commencement to have been greatly taken with the personal appearance and conversation of Mr. Lane, and in the sequel to have conceived a violent and passionate attachment towards him. Mr. Lane, if the diary can be trusted, was marked in his attentions to Mrs. Robinson, seeking her society and conversation ; but his intercourse with the lady does not appear at this period to have ever assumed the character of undue familiarity or of improper design. In the latter part of the summer of 1852 Mr. and Mrs. Robinson, with their family, returned to England, and in the November of that year settled at Reading. In the summer of the ensuing year, 1853, Dr. Lane had taken Moor Park, and opened the mansion there as a hydropathic establishment, whereupon the intercourse of the two families was renewed ; it appears from the journal that in the interval the partiality of Mrs. Robinson for Dr. Lane had remained unabated. With the renewal of the intimacy it acquired increased vehemence, although she records her strong conviction that " friendship and respect were all he would

1859.

March 2.

 ROBINSON
 v.
 ROBINSON.

1859. "ever feel for her." In the latter part of the autumn, Mr. and Mrs. Robinson, with their family, went to France, from which they returned only at the close of the year. With the exception of epistolary correspondence, the intercourse with Dr. Lane appears to have been suspended till the summer of 1854. In the meantime Mrs. Robinson appears to have conceived and to have been occupied with a fanciful predilection for a Mr. Thom, who occasionally came to give instruction as tutor to her sons; a predilection which does not appear to have been returned by Mr. Thom, much to the chagrin and mortification of the lady, who nevertheless writes of him in the most impassioned language, saying that "passion clings to her heartstrings," and that "she cannot divest herself of his image." Having thus written respecting Mr. Thom in August, on proceeding to Moor Park in the ensuing month of September, partly to consult Dr. Lane professionally, and partly on a visit to him and his family, her passion for the doctor seems to have revived in all its intensity, though Mr. Thom appears to have still retained some hold on her affection. In the following month of October scenes are recorded with Dr. Lane from which we are invited by the petitioner to infer that acts of adultery must have taken place. These passages, it is unnecessary to set forth; they were elaborately commented on in the arguments at the bar, and they are of such a character as to render it not desirable unnecessarily to repeat them; we shall therefore content ourselves with stating, further on, our opinion as to their general effect. They must be taken, however, in conjunction with the somewhat singular circumstances that within a few days of the last of these entries Mrs. Robinson, having left Moor Park, complains of Dr. Lane's coldness and indifference, speaks of him as thinking little of her, while she speaks of Mr. Thom as thinking more steadily of her, and laments her "unhappy turn of mind in clinging to shadows and delusions." In the November of the year 1854, Mr. and Mrs. Robinson left England for Boulogne, where they remained till the June of the ensuing year. In the interval we find Mrs. Robinson taken up with a French gentleman who acted as tutor to her sons; again dwelling, as in the case of Mr. Thom, on commonplace attentions as marks of devotion, and again lamenting, in the

March 2.

ROBINSON,
v.
ROBINSON.

sequel, the indifference and neglect of her supposed admirer. On revisiting Moor Park, however, on her return to England, her passion for Dr. Lane resumes its course as though it had never been interrupted. Again, we have entries in the diary of scenes of criminal familiarity, accompanied, however, as in the former instance, with complaints of disappointment, and of the coldness and instability of Dr. Lane. In the October of 1855, Mrs. Robinson is again at Moor Park, and again we have details of scenes of passionate and guilty endearments, but again followed by complaints of the want of devotion and reciprocity on the part of Dr. Lane, of whom in one passage she observes, that "a regard for reputation and ease were the "moving springs of his conduct." These passages in the diary of Mrs. Robinson, to which we have been referring, are relied on by the petitioner as admissions of actual adultery, or, at all events, of a criminal familiarity from which adultery ought necessarily to be inferred. On the part of the respondent it was strongly contended that these narratives were the insane delusions of a diseased mind, to sustain which proposition evidence was adduced that Mrs. Robinson had for many years been labouring under uterine disease; and we were assured, on the highest medical authority, that the effect of such a disease was sometimes to produce mental derangement of the most painful nature with reference to sexual feelings, and an insane belief of having committed unchaste acts, which had no existence except in the mind of the woman confessing them. We find, however, nothing in this case which would warrant us in concluding that the scenes narrated by Mrs. Robinson were the delusions of a disordered mind. Had they been so, we should, no doubt, have found, what is usual in such cases, the statement or confession of them to others, not a mere recording of them among the other events of her life in a secret journal, to be seen by no eye but her own. In cases of maniacal delusion of this character, self-accusation seems always to be a feature of the disease. Probably, too, we should have found more distinct and unequivocal statements of the full consummation of her desires than are to be met with in the diary. Certainly, we should not have found, in so many instances, complaints of imperfect pleasure or of painful disappointment. As we cannot therefore adopt

1859.

March 2.

ROBINSON

v.

ROBINSON.

1859.
March 2.
—
ROBINSON
v.
ROBINSON.

the view suggested as to the insane unreality of the narrative of Mrs. Robinson, it becomes necessary to consider the effect of this remarkable document, to see whether we can conclusively collect from it that adultery has in fact taken place. Now, in the majority of instances, in describing the private interviews of Mrs. Robinson and Dr. Lane, the narrative speaks of acts which, though no doubt of most guilty character, yet do not amount to actual adultery. In other instances the language is ambiguous: it may be taken to import actual consummation or to refer only to indecent familiarities and caresses, such as we have before referred to, and which, however criminal, would not justify us in decreeing a divorce. In one instance language of the sort, which might be construed into a complete confession of adultery, is afterwards used under circumstances in which it is plain that no such meaning can attach to it. In no instance do we find a clear and unequivocal admission of adultery having taken place. The strongest passage is that in which Mrs. Robinson states that, after one of these interviews, Dr. Lane desired her to take care to "obviate consequences;" but even here the "consequences" referred to may have been those of detection in a criminal intimacy, not those resulting from actual adultery. It is true, that, where we are dealing with admissions by a wife of criminal and indecent familiarities bordering upon, and, morally speaking, partaking of adultery, the disposition of the Court would be, for obvious reasons, to give the fullest effect to the language. But in the present case these are considerations which lead us to think that the language of Mrs. Robinson in her diary must be construed by a different rule. We are dealing with one whom an ardent imagination and a too passionate nature too often lead away beyond the bounds of reason and truth; and who, in all that related to her intercourse with men for whom she had conceived a partiality, was prone to exaggerate and overcolour every circumstance which tended to her gratification. Of this we have a striking instance in her intimacy with Mr. Thom, where we find her magnifying into the most serious importance circumstances which were proved to us by that gentleman to have been of the most ordinary and trivial character. In the present instance this tendency would be more strongly brought into

play by the strength and ardour of her passion for Dr. Lane. It is plain that she dwells with impure gratification on the portraiture of these scenes, and on the details of the guilty endearments and caresses which she narrates. It is impossible to say how much of all this may not be the work of an imagination corrupted by sensuality and dwelling with morbid satisfaction on its own impure creations, or how far any groundwork of fact may be distorted and overcharged by the fanciful additions of the writer. At all events we are of opinion that all that comes from such a quarter on such a subject, far from being taken as a ground for drawing further inferences of criminality, must be received with very great allowance and distrust. Having no further evidence than the statements of a writer in whose judgment and fidelity to truth in the particular matter we can place no confidence, and whom we believe capable of distorting and discolouring facts to gratify her disordered fancy and morbid passion, we should have had great doubt whether, if her admissions had amounted to a clear acknowledgment of adultery, we ought to have given effect to them; but, looking to the ambiguous character of the expressions, coupled with her reiterated complaints of the absence of equal ardour on the part of Dr. Lane, we cannot under all the circumstances of the case come to the conclusion that we have any such admission of adultery as we should be justified in acting upon. True it is, that upon evidence *aliunde* of acts of guilty familiarity such as are here detailed, the Court or a jury would have no hesitation in inferring actual adultery; but we are here dealing with confessions made by a party who seems to have had every disposition to overstate rather than to suppress, and who in these admissions must be taken to have gone to the utmost limits of reality. To statements so made it is not open to us to add anything by way of inference. It is unnecessary to take upon ourselves the difficult task of determining whether the whole of Mrs. Robinson's revelations are imaginary, or how much is to be set down as fiction, and how much as fact: it is enough that, on the whole, we come to the conclusion that we have not before us evidence of adultery on which we should be justified in pronouncing a sentence of divorce. We regret the position of the petitioner, who remains burdened with a wife who

1859.

March 2.

ROBINSON
v.
ROBINSON.

1859.
March 2.
—
ROBINSON
v.
ROBINSON.

has thus placed on record the confession of her misconduct; or, at all events, even if the most favourable view be taken of the case, of unfaithful thoughts and unchaste desires; but we can only afford redress on legal proof of adultery, and that proof we cannot find in the incoherent statements of a narrative so irrational and untrustworthy as that of Mrs. Robinson. Entertaining the opinion we do, that the evidence derived from the journal itself is not sufficient to warrant our pronouncing a decree for dissolution of the marriage, we have thought it unnecessary to enter into the consideration of the evidence given by Dr. Lane. In the view we take there remains no course open to us but to dismiss this petition.

Mr. Bovill, Q.C., asked for Mrs. Robinson's costs to be taxed against the husband; she was the successful party in the suit.

Dr. Addams, Q.C., *contrà*: Independently of the peculiar circumstances of this case, Mrs. Robinson has an independent income.

On this being admitted by her counsel, though the amount was not precisely agreed upon,

COCKBURN, C. J.: We are of opinion that this is no case for costs, assuming that the wife has any separate income.

Mr. Bovill, in the absence of *Mr. Forsyth*, Q.C., asked for Dr. Lane's costs; there was no evidence against him.

BY THE COURT: Not anticipating that this question would be raised today, we are not prepared to decide it. It may be mentioned again, if in the exercise of their discretion his counsel think fit so to do.

C A S E S

IN THE

COURT OF PROBATE.

SYMES *v.* GREEN.

1859.

Will.—Insane Delusion.

April 12 & 20.
SYMES
v.
GREEN.

B., a captain in the army, and having an appointment at Chatham, was attacked with illness in the beginning of August, 1857, which affected his mind. In the course of a fortnight he became better, and went on a visit to friends at Lewes, with whom he remained till the last week in September, and apparently conducted himself quite rationally. About a fortnight before he left Lewes he received, after conference with and the approbation of the incumbent of the parish, the communion for the first time. He returned to Chatham on the 29th of September. On the 30th he wrote a testamentary paper, which was executed by him, and attested by two brother-officers on the 1st of October. He had immediately on his return to Chatham shown symptoms of returning or reviving mental disease, which specially took the form of an uncontrollable idea that he must be eternally damned for having received the communion unworthily. A few days after the date of the will he was pronounced insane by a medical board, and died in September, 1858, in a lunatic asylum :

Held, that if a will, rational on the face of it, is shown to have been executed and attested in the manner prescribed by law, it is presumed, in the absence of any evidence to the contrary, to have been made by a person of competent understanding. But if there are circumstances in evidence, which counterbalance that presumption, the decree of the Court must be against its validity, unless the evidence on the whole is sufficient to establish affirmatively that the testator was of sound mind when he executed it.

That though the will propounded was sensible on the face of it and contained no trace of any reference to or connection with the testator's then subject of delusion, yet that, as the production of an unsound mind, it was not entitled to probate.

1859. The facts of the case, which turned entirely on the condition
 April 12 & 20. of mind of the alleged testator, are sufficiently detailed in the
 judgment. The evidence was taken and the case argued before
 Sir C. Cresswell on the 12th of April.

SYMES
 v.
 GREEN.

Dr. Deane, Q.C., and Mr. J. B. Karlake, for the plaintiff.

Dr. Addams, Q.C., and Dr. Twiss, Q.C., for the defendant.

Cur. adv. vult.

SIR C. CRESSWELL: In this case William Symes pro-
 April 20. pounded a will made by Captain William Nott, late of the
 83rd Regiment, and averred in the usual form that it was
 duly executed, and that the alleged testator was of sound
 mind. The defendant, a nephew of Captain Nott, and his sole
 next of kin, by his guardian pleaded that the will was not duly
 executed, and that Captain Nott was not of sound mind at the
 time.

The execution of the will, as required by the stat. 1 Vict.
 c. 26, was duly proved. The real controversy was as to the
 competency of the testator, and in order to determine that
 question, it will be necessary to examine the evidence that was
 given before me. Before I proceed to do so, I will endeavour
 to explain the principle of law to which in my judgment that
 evidence must be applied.

If a will rational on the face of it is shown to have been ex-
 ecuted and attested in the manner prescribed by law, it is pre-
 sumed, in the absence of any evidence to the contrary, that
 it was made by a person of competent understanding. But
 if there are circumstances in evidence which counterbalance
 that presumption, the decree of the Court must be against its
 validity, unless the evidence on the whole is sufficient to estab-
 lish affirmatively that the testator was of sound mind when
 he executed it.

The personal history of Captain Nott was rather singular.
 He was the son of an attorney named Green; he was appren-
 ticed to a surgeon, and after two years quitted him, and with-
 out the knowledge of his parents enlisted in the 83rd Regi-
 ment in 1827, in the name of William Nott, which he always
 bore afterwards. In 1841 he obtained a commission as the
 reward for good conduct, and rose to the rank of captain in

that regiment. After serving in India for several years, he returned to this country with invalids in 1854, and in 1855 was appointed instructor in the School of Musketry at Chatham. After his father's death his mother married the plaintiff. She died in 1846, and plaintiff married again. On Captain Nott's return from India in 1854, he spent three months at the plaintiff's house; and the latter with his wife, on more than one occasion, afterwards visited Captain Nott at Chatham. Captain Nott's brother (defendant's father) died before his return from India, and his son, the defendant, was then living in London under the care of Mr. Cobb, his guardian, and Captain Nott occasionally, when in London, went to see him. The duties of Captain Nott's office were very arduous, but he continued to discharge them without the occurrence of anything remarkable till the end of July, 1857. On or about the 1st of August in that year, it was manifest that he was seriously ill. He laboured under great excitement, was extremely restless, at times could not articulate, and had occasional fits. The medical staff officers considered him insane, and not in a state to take care of himself, and an hospital orderly and his own servant were charged to keep watch over him. That he was insane was fully established, for he had many delusions, sometimes fancying that persons were coming to take him away; at others, that his attendants were going to murder him, and that his servant had attempted to destroy him by fastening poisoned pills to his legs, which the military surgeon had rubbed off. On more than one occasion he manifested a desire to commit suicide. When he had been for about a fortnight in this state he became more tranquil, and was allowed to go, attended by an hospital orderly, to the house of Mr. Symes at Lewes; the orderly left him next day, and he remained at Mr. Symes's house until the 29th of September. According to the testimony of Mr. and Mrs. Symes, and two ladies, Mrs. Ireland and Miss Symes, who were on a visit there during different portions of that interval, he was then quite rational, constantly associated with the family, employed his time in reading aloud to them, or in listening to them when reading, in walking about and conversing with them; and had there been no evidence of a further manifestation of insanity I should have thought that he had perfectly recovered

1859.

April 20.

SYMES

v.

GREEN.

1859.
April 20.
—
SYMES
v.
GREEN.

from the attack at Chatham. But it appeared that about a fortnight before his return to Chatham he had a desire to receive the sacrament of the Lord's Supper; that he had scruples on the ground of his being unworthy; that he conversed with the incumbent of the parish on the subject, and, encouraged by him, attended that holy ordinance on the following Sunday. During the service he told Mr. Symes, who was with him, that he could not receive it, for he felt unworthy; but, encouraged by him, he went to the altar and partook of the consecrated elements. After the service was over he became much excited, expressed a strong conviction that he had committed an unpardonable sin in receiving that sacrament unworthily, and then became miserably depressed, feeling that he was irrevocably doomed to eternal perdition. On the 29th he returned to Chatham, accompanied by Mr. Symes, whose opinion as to his then state of mind may be collected from his own account. He stated that while going from Lewes to London the captain was calm, but that the effect of the journey was to excite him. That at Chatham he met in the barrack-yard Dr. M'Lean, first-class staff-surgeon, and said to him, "I have brought Captain Nott back in a very excited state, and put him under your charge. I do not know what to do with him; he has frightened my wife, who is a very nervous person." Dr. M'Lean's version of the conversation was: "I have brought him back again as bad, if not worse, than ever." Query, "Then why did you bring him back?" To which he answered, "The fact is, he has frightened my wife nearly out of her senses." Dr. M'Lean visited Captain Nott immediately, and from his appearance and manner thought him quite insane. Captain Nott told him that he was a miserable man, that he had taken the sacrament unworthily, and was for ever damned, and felt so, and this he repeated in substance on the same day to several other persons—Dr. Huish, Robert Rankin, the hospital orderly in attendance upon him, and John Harrington his servant. The doctor ordered his servant and the hospital orderly to watch him, and on the next day the case was handed over to another staff surgeon now serving abroad, and whose evidence therefore could not be obtained. This evidence was confirmed by that of Dr. Huish, another staff surgeon at Chatham, who saw him on the 30th of September, and then thought him quite insane,

and advised that a medical board should be held to consider his case, which met on the 6th of October, and reported him to be insane; and on the 7th he was removed to Fort Pitt, an establishment at Chatham for insane patients. The men who were in his service before he went on leave in August, and after his return, gave similar evidence. Another witness, James Menzies, who had known him for several years, and who had rooms on the same floor in Chatham barracks, stated that he saw him on his return on the 29th of September, and sat with him for an hour. He thought him quite insane, and described him as sitting for five minutes together looking at him without speaking, then getting up, exclaiming, "Those horrid thoughts," and rushing into his bedroom. On the 30th he went into Menzies' room and said he was about to make his will; he seemed much excited, and said he had written one or two which did not please him, and he had torn them up. Menzies, in consequence of his opinion as to the state of his mind, tried to dissuade him; he left the room and never mentioned the subject again. It appears that on the same day the will now propounded was written, although not then executed. It was in these terms:—

"I, William Nott, captain in her Majesty's 83rd Regiment of infantry, being of sound mind and memory, do hereby direct that all my personal estate whatsoever, after the settlement of my just debts, be equally divided between William Symes, Esq., of Schott-hill, county of Essex, and Lucy Ellen Tildesly, of Charlton, near Sunbury, Middlesex, England, and all which goods, chattels, or credits, I do hereby give and bequeath for their sole and absolute benefit; and if one of them only should be alive at the time of my decease, then the whole to be his or her sole property—as witness my hand, this 30th day of September, 1857.

"WILLIAM NOTT, Captain 83rd Regt.

"Signed by the said William Nott, in the presence of us, who in the presence of each other, and at his request, have hereto subscribed our names, this day and year above written.

"EDWARD NEL. BRAY, Captain 83rd Regiment,
Chatham, 1st October, 1857.

"JOHN M. LYLE, Captain 29th Regiment,
Chatham, October 1st, 1857.

1859.
April 20.
—
SYMES
v.
GREEN.

1859.

April 20.

SYMES

v.

GREEN.

"Codicil to my will as above :

"In addition to the above, I bequeath my gold watch to my step-godmother, Mrs. Symes.

"W. Nott, Captain 83rd Regiment."

Lucy Ellen Tildesly, to whom a moiety of his property was bequeathed, was a lady with whom he had been acquainted from a very early age, and to whom he was engaged to be married in 1832, and so continued until after his return from India. In December, 1854, he broke off the engagement: of this transaction no explanation was given. It appears, however, that after some entreaties on her part he had consented to correspond with her, and one letter from him of the 21st September was read, but was not so material as to require further notice. On the 1st of October this will was executed by Captain Nott, in the presence of Captain Lyle and Captain Bray, whose evidence is very material. Captain Lyle's evidence was to the following effect:—"I became acquainted in 1855 "with Captain Nott. He was instructor of musketry at Chat-
"ham. The duties were very heavy; the office has since been
"divided. Was on leave at Jersey when he was taken ill. I saw
"him on the 29th, when he returned; I saw him in his own quar-
"ters. I went up and said, 'I am delighted to see you back; how
"are you?' He said, 'Lyle, I'm better, thank you; but I have
"not been well' (pointing his hand to his head). 'I have re-
"turned to try if a little work will do me good.' I saw him
"at mess, I believe, next day. One day, I think I was going up
"to his room, he met me and asked me to go up to his quarters;
"I found an officer I had not known before. I afterwards
"became acquainted with him as Captain Bray, of the 83rd.
"After a time Nott asked me to witness his will. I can't re-
"member the words he used. I think, to the best of my be-
"lief, I saw him sign it; but I won't swear; the paper was
"placed on the table by the first window. Captain Bray signed
"it and then myself." (On the will being shown to the wit-
"ness), "What was written below my name was not on the
"paper at the time. I don't know what became of the will
"after I signed. We had conversation on general subjects
"for some time. He was excited and had a suspicious look.
"I could detect nothing wrong in his conversation. I
"should not have thought about it if I had not heard that he

"had been very ill." On cross-examination, he said: "Before I witnessed the will I had been told by the medical man and by his servants that he had been insane; but I was pleased to find he was not so bad as I had expected from the accounts. Deceased was excited, suspicious; but he was always more or less a curious man. I have said I signed the will to pacify him; I was doing him a kindness, doing my duty towards him in so doing. I believed at the time I signed the will the law would put it aside. My ideas of the law were that a man insane was not fit to make a will." On re-examination, he said: "Having considered all that came under my observation, I now think he was capable of making a will." In answer to a question put by the Court: "I saw nothing at that time in Captain Nott's conversation and behaviour irrational beyond what seemed to me a suspicious look."

Captain Bray said: "I was in India in 1851 with the 83rd, when Nott was with the regiment; some years after Nott left to go to England. In 1857 I returned from India. I went to Chatham two or three days before the 1st of October, 1857. I had not seen Nott in the interval. I saw him on the 29th of September; he was the officer in command of my depôt, and we had conversation. He treated me when I entered as if he had seen me the day before, whereas we had not met for four years, which made me at once observe him. Was with him at least an hour, talking on professional matters. He talked rationally, but not according to his usual habit as I had known him; he had been a most precise, methodical man, and quiet to a degree in conversation and manner; now he was excitable, restless, his eyes wandering about the room. I don't distinctly recollect whether I saw him next day. I remember being in his room when Captain Lyle was sent for, and Nott asked us to sign his will." (Nothing however turned on the fact of execution, which was not disputed.) "Now I recollect, I must have seen the will before Lyle came into the room, because I had tried to put him off signing it." On cross-examination: "I had heard he was under treatment for insanity at the time, so I tried to put him off signing it. My idea was that he was not fit to make a will. I did not think that he had any relations, or that it was a matter of

1859.
April 20.
—
SYMES
v.
GREEN.

1859.
 April 20.
 —
 SYMES
 v.
 GREEN.

“much importance one way or other whether he made a will
 “or not. My idea was derived from what I had heard and
 “had observed myself. He was then very excitable, quite
 “different from what he used to be; he insisted on signing;
 “I saw it was necessary to please him.”

Now, excluding from consideration for the moment the circumstances of receiving the sacrament and the effect which it produced on Captain Nott's mind, the case would stand thus: Captain Nott in August was decidedly insane. He went to Mr. Symes's house at Lewes on leave; he conducted himself as a rational being—conversed, read, and acted as a sane man. Returned to Chatham on the 29th of September, wrote a will on the 30th, which, on the 1st of October, was executed in the presence of two witnesses, who, from his previous illness and his manner and demeanour then, thought him insane. Could the Court, under such circumstances, have safely pronounced that this was the will of a competent testator? The will itself is rational on the face of it, but the evidence of the attesting witnesses is sufficient to counterbalance the first presumption of sanity; and then, weighing the decisive evidence of previous insanity and the evidence of the attesting witnesses against the evidence of his rational conduct at Lewes, could I say that the affirmative of sanity is established? and, if not, the will could not be admitted to probate. But when, in addition to this, the fearful condition of mind in which Captain Nott returned to Chatham is considered, I can no longer hesitate as to the decree which ought to be pronounced. Far be it from me to say that a man is insane because he takes a gloomy and desponding view of his spiritual condition, or because he puts a different construction on certain passages of Scripture from that which is attributed to them by the most learned and pious persons, and torments himself with fears which to most men may seem groundless. But in this case the unhappy man seems to have been unable to control or suppress his thoughts, or to reason about them. See how he wrote to Mrs. Ireland (a lady whom he met at Mr. Symes's house) on the subject:—

“Chatham, September 30th, 1857.

“Dear Mrs. Ireland,

“Mrs. Symes wrote to you on my present distressed state of mind. I'm glad she did so; but, before I give you a state-

ment of the circumstances, I beg of you totally to divest your mind of any opinion (as formed by the doctor and Mrs. Symes) that this depression arises from any excitement consequent on my late illness. I appeal to yourself if any man could have been more cheerful and happy or recovered sooner than I did." [He then narrates his preparation for receiving the sacrament, interviews with the clergyman, etc.] "Just before the ceremony I told the doctor that I did not feel prepared. He said that he felt so the first time; all people did. I allowed myself to be persuaded against my own convictions. I went, and from the next day I was not only not a happy man, but certainly the most miserable. The doctor and Mrs. S. may tell you (as they repeatedly did me) that it was excitement at first. I could not rest at night; the doctor gave me strong opiates, and was early at my bedside in the morning. In a few days I had most horrible (thoughts)—too horrible to think of. I tried all I could to suppress them; but I sometimes thought they were so perfectly involuntary they might not be put to my charge. I did not acquaint the doctor or Mrs. S.—it would have distressed them; but they plainly saw I could rest nowhere. The two causes of taking the sacrament unworthily appear to be—first, receiving the bread and wine as a common meal, not discerning the body and blood of Christ therein. I had got thus far when I received the plainest warning from God not to write what I was going to say. There could be no mistake; it was as plain as if God had spoken Himself. I was sure these horrible thoughts could never have arisen had not I committed some dreadful crime. I see it all now. If God Almighty does not forgive this sin and be gracious, I am lost to all eternity. I can only ask your prayers and any consolation you can give to such a miserable wretch as

"W. NOTT."

Mrs. Symes received a letter, dated Chatham, October, 1857, in the same strain, referring to the letter he had written to Mrs. Ireland, and describing its interruption as follows:—

"I said, firstly, by eating the bread and drinking the wine without discerning in them the body and blood of Jesus Christ, I was proceeding to say that I did not think I had done so; but before I could make the first letter I received a most powerful and solemn warning not to proceed, convincing me

1859.

April 20.

SYMES
v.
GREEN.

1859.
April 80.
—
SYMES
v.
GREEN.

that if I did it would be a lie, and giving me the strongest internal assurance that I had then unworthily taken the communion. I think it must be the same description of manifestation of the Lord's Spirit as given in the former days. The conviction could not have been stronger on my mind had the Almighty spoken in the room. Of course, after such a warning, I wrote no more on this to Mrs. Ireland. What I did conclude my note with I really do not know. I most solemnly declare that this assurance and conviction of my sin was thus wonderfully given as described; it occurred about ten of forenoon—no night-dream . . . Last night not one moment's sleep, walking about the room till morning. If I laid down I found the bed worse than walking by day (except when engaged) by these horrible thoughts."

After such letters as these it is hardly possible to suppose that his feeling as to his then state was that of a man reasoning upon his fitness or unfitness to attend a solemn religious ordinance, or that it was anything else than a fresh manifestation of that aberration of intellect under which he had previously laboured. Even assuming that a temporary restoration of sanity had taken place, can I doubt that the brain was liable to be again disturbed by any exciting cause, and that his attendance at the altar was sufficient for the purpose, and that the feelings which ensued were not the result of reason and reflection, but of insanity? A very learned divine, enumerating various causes of religious terror, includes amongst them disorders of the mind, and says: "The melancholy man, "who thinks himself in a state of damnation, without any "reason or power to reason on the case, is as certainly on "this point a madman as the poor wretch whose disorder has "taken another turn and makes him believe himself to be a "king or an emperor." In that opinion I concur, and such I take to have been the condition of Captain Nott; and although there is nothing irrational in the will itself, and there was no proof of any connection between the will and the particular manifestation of insanity, if it was the offspring of a mind diseased, it cannot be accepted as the will of a person of a sound and disposing mind. There was nothing in the subsequent history of Captain Nott's case to alter this view. Soon after his removal to Fort Pitt he became much worse;

his memory of recent events quite failed, he became subject to various delusions, and was not rational on any subject. Towards the end of November there was some improvement, but he soon experienced a relapse, and on the 31st of December was removed to a private asylum at Henley-in-Arden, where he remained quite insane until the month of September, 1858, when he died.

The decree of the Court therefore is against the will, and the probate is refused.

Dr. Deane applied to the Court to make an order for the plaintiff's costs to be paid out of the estate.

SIR C. CRESSWELL declined to make the order.

Probate refused.

1859.
April 20.
—
SYMES
v.
GREEN.

JEAN DE CHATELAIN AND CLARA DE CHATELAIN v. VICTOR DE PONTIGNY. April 16 & 27.

Married Woman.—Will.—Alleged Power.—Duty of Court of Probate under Barnes v. Vincent, 5 Moore, P. C.

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JEAN DE
CHATELAIN
AND
CLARA DE
CHATELAIN
v.
DE PONTIGNY.

B. died in 1857, leaving a testamentary paper in her own handwriting, and signed by her, dated July, 1832, by which she bequeathed her whole property, whatever it might be at her death, to her daughter. Under articles of a marriage-settlement the trustees held certain property in trust for B.'s separate use during coverture, and after her decease for such persons as B. should by her last will, by her signed and published in the presence of and attested by three witnesses, appoint. In July, 1832, B.'s husband was alive, but predeceased her. The testamentary paper contained no reference whatever to the power, and was not published or attested. In the pleadings the plaintiffs alleged that it was made in pursuance of a power, and the marriage articles giving some power were not disputed. The Court held that *Barnes v. Vincent*, 5 Moore, P. C., was conclusive; that where a power is before it, and an averment that a testamentary paper was made in pursuance of a power, the Court is bound to grant probate, and thereby to leave it to the competent court of construction to decide whether the testamentary paper is a due execution of or operative under the power.

This was a question on application for a grant of adminis-

April 16 & 27. **JEAN DE CHATELAIN AND CLARA DE CHATELAIN v. DE PONTIGNY.** tration, with the will annexed, of the goods of Mary de Pontigny. The plaintiffs were the son-in-law and only daughter of the deceased, the defendant her only son. The alleged testamentary papers were found in a bureau of the deceased after her death, in August, 1857, and were in the following terms:—

“ My Will. Having made mature reflections on the subject of disposing of my property, and considering that my son is in all probability amply provided for, and that my daughter stands the chance of receiving but little from any other source, I, Mary de Pontigny, have resolved to bequeath unto my daughter Clara de Pontigny the whole of my property, whatsoever be the amount that it may be at the time of my death. I entreat my dear children to believe that this is not dictated from any partiality, for I love them equally, but that it appears to me but justice, considering circumstances. This is my last will; no other will be found except an exact copy of this.

“ Witness my hand, **MARIE DE PONTIGNY,**

“ Norfolk Street, Strand.

“ 22nd July, 1832.”

This document was admitted to be in the handwriting of the deceased, and to be written on the day of which it bore date; it was also admitted that her husband was then alive. This was accompanied by a letter of the same date, addressed to her children, by which she desired that they should divide between them her books, drawings, prints, trinkets, etc., and left her son £20 to be laid out in any mourning ornament. It will be observed that these papers bore date before the present Wills Act came into operation. The other facts of the case were all admitted, and those pertinent to the question will be found sufficiently stated in the judgment.

On April 16 the case was argued by

Dr. Phillimore, Q.C., and Mr. T. Chitty, for the plaintiffs.

Dr. Deane, Q.C., and The Hon. G. Denman, for the defendant.
Cur. adv. vult.

April 27. **SIR C. CRESSWELL:** The plaintiffs in this case propounded

the will of Mary de Pontigny, bearing date July 2, 1832. The defendant pleaded that, at the time of the making of the will, Mary de Pontigny was a married woman, and that the will was not made with the consent of her husband, nor in pursuance of any power of appointment. Plaintiffs replied that it was made in pursuance of a power; that a considerable portion of the personal property left by the testatrix consisted of savings out of her separate income; that the will was made with the consent of her husband. Clara de Chatelain and the defendant were the only children of the testatrix. The suit was an amicable one, and all the facts were admitted.

The material facts were, that the testatrix was the only child of John and Ann Livie. On her father's death intestate she became entitled to certain real property, subject to her mother's dower, and to certain personal property. In 1803 Mary Livie, then a minor, was about to contract a marriage with Victor de Pontigny, and articles were entered into, reciting, amongst others, the facts above mentioned, and that it had been agreed that all the property, real and personal, of Mary Livie should be conveyed to trustees upon trusts thereafter declared; and Victor de Pontigny covenanted that, from and after the solemnization of the marriage, upon Mary Livie's attaining the age of twenty-one years, he would convey and settle the freehold property of Mary Livie, and any freehold property that she might thereafter become entitled to, and all her personal estate and all personal estate that she might thereafter become possessed of or entitled to during the said intended coverture, or which he, Victor de Pontigny, in her right, should become possessed of, and all accumulations of such property, to the trustees named and their survivors, for her sole and separate use during coverture, and after her decease in trust for such person and persons, and for such uses, etc., as the said Mary Livie, notwithstanding her said intended coverture, and whether she should be covert or sole, should by her last will and testament in writing, or any writing in the nature of or purporting to be her last will and testament, to be by her signed and published in the presence of and attested by three credible witnesses, should direct, limit, or appoint: and in default, etc. The marriage was solemnized, and in 1808 a settlement was made in pursuance of the articles. From the time of the marriage till 1819 Victor

1859.

April 27.

JEAN DE
CHATELAIN
AND
CLARA DE
CHATELAIN

v.
DE PONTIGNY.

1852.
April 27.
JEAN DE
CHATELAIN
AND
CLARA DE
CHATELAIN
v.
DE PONTIGNY.

de Pontigny and the testatrix lived together in London and had two children, Clara de Pontigny and the defendant; they then separated, and she left London and lived in Paris till 1828. In 1828 he went to live in France, and remained there till his death in 1845; in the same year (1828) his wife returned to England, and remained there, and from that time both her children lived with her. The annual income of Mary de Pontigny's separate property was about £120. From 1828 till 1835 her husband made her an annual allowance of £120, and a similar allowance was made by Ann Livie, her mother, who died in 1840, and by her will left the residue of her property, amounting to about £20,000, to trustees for her daughter for life, with remainder to her two children, Clara de Chatelain and the defendant, in equal shares. The plaintiff married in 1843, when a settlement was made, in which mention was made of a sum of £640, which Mary de Pontigny had lent out of accumulations or savings, etc. It was admitted that the said sum of £640, or a considerable portion of it, had been saved or accumulated by or to the said alleged testatrix out of the property settled by the deeds of 1803 and 1808 at the time of the making of the alleged will in 1832. At her death she was possessed of much more property, which she had saved out of the settled property and that which was bequeathed to her by her mother.

Victor de Pontigny, the father of the defendant, when living in France, made a will leaving all his property to his son. His power to do so was contested, and it was decided that he had power to dispose by will of one-third only, and that the other two-thirds must be equally divided between the two children. But it seems to me that this does not in any way affect the question to be determined by this Court.

Upon this state of facts it was contended for the plaintiffs that, inasmuch as the settlement conferred upon Mary de Pontigny a power to dispose of her property by will, notwithstanding coverture, if she made a will this Court must grant probate of it, without inquiring whether it duly executed the power or not; and the case of *Barnes v. Vincent*, 5 Moore, P. C. 201, was relied on. It was admitted that the will cannot be sustained on the ground of its having been made by assent of the husband, inasmuch as he died before her; but it was argued that, even if not to be received on the ground

of the power, Mary de Pontigny had a right to dispose by will of her savings out of her separate income. On the other hand, it was admitted that the decision of the Judicial Committee in *Barnes v. Vincent* is binding on this Court where applicable; but it was suggested that probably the whole will was not set out in the report of the case in 5 Moore, 203; for Lord Brougham, in his elaborate judgment, speaks of the will as professing or purporting to be made in execution of a power; whereas the will, as set out, contains no reference to it. Mr. Moore has been kind enough to furnish me with the printed papers that were before the Judicial Committee, and it appears that the will is correctly set out in 5 Moore, as might have been expected from the well-known accuracy of the reporter. It appears that in the allegation propounding the will, it was averred that the will was made in execution of a power; and I cannot but suppose that Lord Brougham's reference must have been to that fact, and not to anything supposed to appear on the face of the will.

The whole scope of the judgment appears to apply as well to prevent this Court from inquiring whether the will is in the form required by law for the execution of a power, as whether it has been executed with the formalities required by a power. At 5 Moore, 214, Lord Brougham says: "It is said that a paper may purport on the face of it to be the will of a *feme covert*, and that such a party is intestable; therefore, unless a power is alleged, the probate must be refused. Then it is argued that the Court to whom such allegation is made has no choice, but must look to see the paper under which the will is alleged to have been made before it can decide whether that paper is testamentary or not. But there seems no insuperable objection to holding that, on a power being alleged, the probate should be granted, because that really decides nothing; it only saves the point for the Court which can competently deal with the question, and avoids the glaring inconvenience and inconsistency of such a decision as we have already described; a decision which is final, conclusive, and binding, if given one way, and only leaves another Court to determine conclusively if given the other way."

Another argument on behalf of the defendant was that in

1859.

April 27.

JEAN DE
CHATELAIN
AND
CLARA DE
CHATELAIN.

v.
DE PONTIGNY.

1859. *Barnes v. Vincent* the will was signed and sealed, which acts were consistent with an intention to execute the power, and might have been an attempt to do it.

JEAN DE
CHATELAIN
AND
CLARA DE
CHATELAIN.
v.
DE PONTIGNY.

But the decision that the Court of Probate has no authority to inquire whether the power has been duly executed or not is equally applicable where the supposed imperfection consists in the want of witnesses, as in the want of any other part of the formalities required by the power. It seems to me, therefore, that the case of *Barnes v. Vincent* is applicable, and that I am bound by it.

As to the power of the testatrix to dispose of the savings, it was contended that she had no power to dispose of her savings out of the allowance made to her by her husband during their separation, for which the case of *Messenger v. Clark*, 5 Ex. 388, was cited; but that has no application to savings out of separate property. It was then said that the accumulations were held subject to her disposal of them in pursuance of the power, and that having accepted authority to dispose of them by a will made in execution of the power, she could not do so otherwise, and not having made a will so as to dispose of the *corpus*, her will could not operate so as to dispose of the savings. But it is clear that the accumulations mentioned in the settlement and made subject to the power are those which were covenanted to be conveyed to the trustees, and which they were to hold subject to the trusts of the settlement, and not to the savings of Mary de Pontigny out of her separate income.

I think, therefore, that the argument for the plaintiffs is well founded, and that the will must be admitted to probate.

METTE v. METTE.

April 27 &
May 4.

METTE
v.
METTE.

Naturalized British Subject.—Will.—Marriage abroad with deceased Wife's Sister.—No Revocation.

A., a native of Marburg, came to England in 1822, aged thirteen, and remained here till his death in 1856, having made occasional visits to Germany. In 1835 he was married in this country to B., a native of Frankfort-on-the-Maine; in 1836 he obtained letters of naturaliza-

tion ; in 1841 he made a will ; in 1844 his wife died, leaving children, and in 1846 he married, at Frankfort, C., who was B.'s sister of the half-blood, and had children by her. On his death his brother took out letters of administration as the uncle and guardian of all the children, none of whom were of age, on the supposition that the will was revoked by the second marriage. The eldest son of the first marriage, on coming of age, called in the letters of administration, and set up the will :

Held, that the principle laid down in *Brook v. Brook*, as to the disability of a native-born English subject to contract such a marriage, applied equally to a naturalized subject ; that though, by the law of Frankfort, C.'s domicile, such a marriage would have been valid, yet the disability of either party to the contract would invalidate the marriage ; that the letters of administration must be revoked, and the probate of the will granted.

1859.
April 27 &
May 4.
—
METTE
v.
METTE.

The question raised in this case was argued on act on petition and affidavit.

Bernhard Mette, the deceased in the cause, was a native of Marburg, in the electorate of Hesse Cassel. He came to England in 1822, at the age of thirteen, and from that time until his death in 1856 lived in England, and for many years carried on business as a tailor in Sackville Street, Piccadilly. Occasionally he paid short visits to Marburg, and to other places in Germany. In 1835 he was married at the parish church of Fulham to Anne Christina Schaefer, by whom he had five children, of whom the plaintiff is the eldest. In 1836 he was naturalized by Act of Parliament.

The Act of Naturalization, after reciting the petition of "Bernard Mette (called in the German language Bernhard Mette), enacts that he shall be and he is hereby from henceforth naturalized, and shall be adjudged and taken to all intents and purposes to be naturalized, and as a free-born subject to the said United Kingdom, and he is and shall be from henceforth adjudged, reputed, and taken to be in every condition, respect, and degree, free to all intent, purposes, and constructions, as if he had been born a natural subject within the said United Kingdom. And be it further enacted, that he the said Bernard Mette shall be and is hereby enabled and adjudged able, to all intents, purposes, and constructions whatsoever, to inherit and be inheritable and inherited, and to demand, challenge, ask, take, retain,

1859.
April 27 &
May 4.
—
METTE
v.
METTE.

“ have, keep, and enjoy, all or any manors, lands, tenements,
“ hereditaments, goods, chattels, debts, estates, and all other
“ privileges and immunities, benefits and advantages, in law
“ or in equity, belonging to the liege people and natural-born
“ subjects of the said United Kingdom, and to make his resort
“ or pedigree as heir to his ancestors, lineal or collateral, by
“ reason of any descent, remainder, reverter, right, title, con-
“ veyance, legacy, or bequest, whatsoever, which hath, may,
“ or shall from henceforth descend, remain, revert, accrue, or
“ grow due unto him ; as also from henceforth to ask, take,
“ have, retain, keep, and enjoy, all manors, lands, tenements,
“ and hereditaments, which he may or shall have by way of
“ purchase or gift of any person or persons whomsoever, and
“ to prosecute, pursue, maintain, avow, justify, and defend, all
“ and all manner of actions, suits, and causes, and all other
“ things to do as lawfully, liberally, freely, and surely, as if
“ he, the said Bernard Mette, had been born of parents being
“ natural-born subjects of the said United Kingdom, may
“ lawfully or in anywise do ; and he, the said Bernard Mette,
“ in all things and to all intents and purposes, shall be taken
“ to be and shall be a natural liege subject to the said United
“ Kingdom, any law, act, statute, provision, custom, ordinance,
“ or other matter or thing whatsoever, had, made, done, pro-
“ mulgated, proclaimed, or provided, to the contrary thereof
“ in anywise notwithstanding. And be it further enacted,
“ that he, the said Bernard Mette, shall not hereby be enabled
“ to be of the Privy Council, or a member of either House
“ of Parliament, or to take any office or place of trust, either
“ civil or military, or to have any grant of lands, tenements,
“ or hereditaments, from the Crown to himself or any other
“ person or persons in trust for him, anything herein con-
“ tained to the contrary notwithstanding. And be it further
“ enacted, that he, the said Bernard Mette, shall not hereby
“ obtain, or be entitled to claim, within any foreign country,
“ any of the immunities or indulgencies in trade which are
“ or may be enjoying or claimed therein by natural-born sub-
“ jects of the said United Kingdom, by virtue of any treaty
“ or otherwise, unless he, the said Bernard Mette, shall have
“ inhabited and resided within the said United Kingdom or
“ the dominions thereunto belonging, for the space of seven

“years subsequent to the first day of this present session of Parliament, and shall not have been absent out of the same for a longer space than two months for any one time during the said seven years, anything herein contained to the contrary notwithstanding.”

1859.
April 27 &
May 4.
—
METTE
v.
METTE.

In 1841 the deceased executed a will according to 1 Vict. c. 26, whereby he gave the whole of his property to his then wife and children. In 1844 his wife died. In 1846 he was married at Frankfort to his wife's sister by the half-blood, which marriage was valid by the law of Frankfort, as well as by the law of Hesse Cassel. After his marriage he returned to this country, and continued to reside and to carry on business here as before. By his second wife he had four children. In April, 1856, he died, leaving both real and personal property. Soon after his death the defendant, Henry Anton Mette, with the assent of the plaintiff, who was then a minor, among others, treating the will as revoked by the second marriage, applied to Sir J. Dodson, the late Judge of the Prerogative Court of Canterbury, for letters of administration to the deceased, on a statement of the facts above set forth, and on the 7th of August, 1856, that learned Judge decreed that the deceased was dead intestate in law, and directed that letters of administration of his personal estate and effects should be granted to the defendant as the lawful uncle of all the children of the deceased by both his wives, for their use and benefit, and until one of them should attain the age of twenty-one years; the said Anna Maria Mette, the relict of the deceased, having renounced letters of administration, and consented thereto. These letters of administration, having ceased in 1857, by reason of the deceased's eldest child, Elizabeth Mette, having attained twenty-one years, further letters of administration were granted to the defendant as the lawful attorney, and at the instance and for the use and benefit of the said Elizabeth Mette. The plaintiff, being now of age, alleged that he was ignorant of his rights when he consented to the grant of letters of administration, and prayed that they might be recalled, and that probate of the will might be decreed.

Dr. Deane, Q.C., and Mr. W. Field, for the plaintiff.

1859.
 April 27 &
 May 4.
 ———
 METTE
 v.
 METTE.

The grant of administration relied upon by the defendant was originally invalid. And, if originally invalid, the plaintiff's assent to it, assuming it to have been given, would be no bar to his present suit. The grant was made on the assumption that the will of 1842 had been revoked by the second marriage of the deceased. But that marriage having been celebrated between parties within the prohibited degrees of affinity, was by 5 & 6 Wm. IV. c. 54, *ipso facto* void, and would therefore have no operation on the will. By *Brook v. Brook*¹ it is decided that this statute is a personal statute, binding on domiciled English subjects wherever they may contract a marriage, and without reference to what may be the *lex loci contractus*. The circumstances of the present case, though in some respects different from those in *Brook v. Brook*, are not sufficient to take it out of the rule there laid down. (1) The deceased in this case, though not a natural-born subject, had at the date of his marriage acquired an English domicile, and had moreover been naturalized by Act of Parliament, whereby (with the exceptions mentioned in the Act of Naturalization) he was put in exactly the same state as if he had been born in the Queen's allegiance. (2 Stephens's Commentaries, p. 384.) "If an alien be naturalized by Act of Parliament, he is not accounted *alienigena*, but *indigena*." (Co. Litt. 8, a.) And again, 'an alien naturalized to all intents and purposes is a natural-born subject.' (*Ibid.* 129, a.) (2) The circumstance that the deceased's second wife was not an English subject, will not render valid the marriage, for the deceased himself was personally incapacitated from contracting it, and it is essential to the validity of a marriage, that both parties should be capable of entering into the contract. (*Conway v. Beasley*, 3 Hagg, 639.) Moreover, as England was, at the time of the marriage, the contemplated matrimonial domicile of both the parties, the capacity of the parties to contract it, must be determined by the law of England. (*Brook v. Brook*; *Robinson v. Bland*, 1 W. Black. 258; *Warrender v. Warrender*, 2 Cl. & Fin. 488.) (3) The marriage was incestuous, although the two wives of the deceased were only sisters by the half-blood. (*The Queen v. St. Giles*, 11 Q. B. 173; *Horner v. Horner*, 1 Consist. 352; Bac. Abr. tit. "Marriage" (A).)

¹ 3 Sm. & Giff. 510.

Dr. Addams, Q.C., for the defendant: The sole question he should raise was as to the effect of the Act of Naturalization. He submitted, that it only conferred on the deceased some of the privileges of a British subject, and did not make him a British subject to all intents and purposes whatever. The deceased's object in obtaining it was to enable him to hold lands. The second marriage being good, by the law of the domicile of the deceased and of his second wife, and by the *lex loci contractus*, was in fact a valid marriage, for it was not in the power of the British legislature to bind an alien, though domiciled here and naturalized, when he was out of the realm. *Primâ facie*, the provisions of the statute must be taken to be confined to British subjects while resident in the realm. (*Jeffreys v. Boosey*, 4 H. L. Cas. 811.) This is not a proceeding *inter vivos*, and it may be a question whether the Court may not recognize the marriage for the purpose of revoking the will.

1859.
April 27 &
May 4.
METTE
v.
METTE.

SIR C. CRESSWELL: Before 5 & 6 Wm. IV. c. 54, would this marriage have been impeachable *inter vivos*?

Dr. Addams: As the marriage was valid by the *lex loci contractus*, the *comitas gentium* might have induced the Ecclesiastical Courts not to interfere. The case is not altogether one *primæ impressionis*. For Sir John Dodson had, after taking two months to consider, made the grant of administration now sought to be revoked.

Dr. Deane, Q.C., in reply, cited *The Queen v. Manning*, 2 Car. & K. 877.

SIR C. CRESSWELL: This was an act on petition of Bernhard Mette, in which the question raised was touching the validity or invalidity of letters of administration which had been granted of the goods of Bernhard Mette, deceased. There were no facts really in dispute between the parties. It appeared by affidavits filed in support of the petition and answer, that deceased, a native of Marburg, in the electorate of Hesse Cassel, came to England in 1822, being then a minor of the age of thirteen, and from that time till his death

May 4.

1859.

May 4.

METTE

v.

METTE.

in April, 1856, lived in England, first as an apprentice, and afterwards carrying on business as a tailor in Sackville Street, Piccadilly, but occasionally paid short visits to Marburg and to other places in Germany. In 1836 he was naturalized by Act of Parliament. In 1835 he was married in the parish church at Fulham, according to the rites and ceremonies of the Church of England, to Anna Christina Schaefer, a native of Frankfort, and by her had five children. She died in June, 1844. In 1841 deceased made and duly executed a will, as required by stat. 1 Vict. c. 26. In 1846 he went to Frankfort, and was then married, according to the rites and ceremonies of the German Protestant Church established at Frankfort, to Emma Maria Schaefer, who had always lived there, a sister by the half-blood to his former wife. By the law of Frankfort, and also by the law of Hesse Cassel, that marriage was valid. Soon after the marriage he returned with his wife to his residence and place of business in England, and continued to reside and carry on business there as before, paying short visits to Germany. By the second wife he had four children. At the time of Bernhard Mette's death his son, the petitioner, was a minor. His uncle, Henry Anton Mette, with the assent of petitioner amongst others, took out letters of administration to the deceased, treating the will before mentioned as revoked by the second marriage. Bernhard Mette, the eldest son by the first marriage, being now of age, alleged that he was ignorant of his rights when he consented to the letters of administration, and prayed that they might be revoked and probate of the will decreed.

On the argument before me it was not disputed by the learned advocate for the administration that the deceased was, when the will was made, and when he contracted the second marriage, domiciled in this country, and so continued until his death; nor was it disputed that the result must be the same, whether the second marriage was with a sister of the former wife by the whole or the half-blood; nor that, if the administration were improperly granted, although by consent, it must now be revoked.

But it was said that the late very learned Judge of the Prerogative Court did not grant administration for a considerable time after the motion for it was made; and therefore, although

no opposition or argument against it was offered, nor any reasons assigned for the grant, it must be presumed that the subject was maturely considered by that learned person, and that he arrived at the conclusion that the will was revoked by the second marriage.

That question depends upon the applicability of the decision of Stuart, V.C., in *Brook v. Brook*, to this case, and the argument was very properly confined to that point. Assuming the law to be as laid down in that case, and in the absence of any appeal from it I think I am bound to do so, had the marriage now in question been solemnized between natural-born British subjects, it would have been void to all intents and purposes, and therefore could not have had the effect of revoking a former will by virtue of 1 Vict. c. 26, s. 18. No question of presumed intention can arise, for the 19th section enacted, that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances, nor indeed would any revocation be of any avail to the second wife and family, unless the marriage is considered valid.

The distinctions between the case of *Brook v. Brook* and the present are two: first, that Bernhard Mette was not a natural-born subject of the realm, although domiciled and naturalized by Act of Parliament; secondly, that the wife was a native of Frankfort, and, until her marriage, domiciled there. If Bernhard Mette was incapacitated from contracting such a marriage, this latter distinction cannot have any effect. There could be no valid contract unless each was competent to contract with the other. The question rests upon the effect of domicile and naturalization. It was said in answer to the petition that Bernhard Mette became naturalized for the sole purpose of holding real property. But the Act 5 & 6 Wm. IV. c. 54, is general in its terms, enacting, by sect. 2, "that all marriages which should thereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity should be absolutely null and void to all intents and purposes whatsoever." It is true that by the law of England a natural-born subject cannot put off his allegiance, but he may take upon himself the duty of allegiance to another State by becoming naturalized there, although he may

1859.

May 4.

METTE
v.
METTE.

1859.

May 4.

METTE

v.

METTE.

be embarrassed by the conflicting duties of a double allegiance. 1 Hale, P. C. 68. Wheaton, in his 'Elements of International Law,' 122, says, "The doctrine of publicists is, that "whenever a child attains his majority according to the law "of his domicil of origin, he becomes free to change his nationality, and to choose another domicil." Whether such a rule is recognized in Marburg or not is immaterial. If Bernhard Mette could not shake off the duty which he owed to his native country, he might renounce the privileges which he enjoyed. By residing and acquiring a domicil here, he made this his country by election as far as in him lay.

Whether he could, by renouncing his rights so acquired in England, and abandoning his English domicil, have regained his former position, so as to be free from the operation of the law, is a question that need not now be considered, for he remained domiciled in this country, and the marriage was with a view to subsequent residence in this country.

It appears to me, therefore, that at the time of the second marriage he, as a natural liege subject, owed obedience to the sect. 5 & 6 Wm. IV. c. 54, and could not contract a marriage in contravention of it. I regret much that I am not in possession of the reasons which induced Sir J. Dodson to grant administration; they might have enabled me to discover that my present opinion is erroneous. But in the absence of any such information, and of any authority or dictum showing that a person naturalized and domiciled is not in this respect to be treated as a natural-born subject, I feel bound to hold that Bernhard Mette was bound by the stat. 5 & 6 Wm. IV. c. 54; that the marriage solemnized between him and the sister of his former wife was void, and that it had not the effect of revoking his will formerly made. The letters of administration must therefore be revoked, and probate of that will decreed. Costs out of the estate.

1859.

MACLEAN AND MACLEAN *v.* DAWSON AND OTHERS (in the Goods of JOSEPH DAWSON, deceased).

May 10 & 18.

MACLEAN AND
MACLEAN
v.
DAWSON AND
OTHERS.

Administration limited to substantiate Proceedings in Chancery.

—15 & 16 Vict. c. 86. s. 44.

B. filed a bill in Chancery against C., D., and E., the trustees and executors under a Scotch probate and confirmation of the will of F., deceased, to set aside as fraudulent a purchase of certain shares in a Scotch company made by F. from B.'s wife, then a spinster, in 1839. When the bill was filed no part of the estate of F. was in England. To this bill a demurrer, on the ground that a legal personal representative of F. constituted by an English Court must necessarily be a party to the suit, was allowed and leave given to amend. B. then cited C., D., and E., to take probate or administration, etc., or to show cause why letters of administration limited as the Court might direct should not be granted to his nominee. C., D., and E. refused to take probate or administration, and contested B.'s right to letters of administration under any limitation whatever.

HELD, that the Court, in accordance with the practice of the Ecclesiastical Courts, will make such grants limited to substantiate proceedings in Chancery on a mere averment of interest, without in any way considering the merits of the case, and that the 15 & 16 Vict. c. 86, s. 44, does not apply to cases where the estate to be represented is the very estate to be administered in the suit.

In this case a citation had issued on the affidavit of Henry Dundas Maclean, calling upon William Dawson, of Carron, near Falkirk, in Scotland, Henry Dawson, of Liverpool, in the county of Lancaster, and Thomas Dawson, now residing at or near Glasgow, in Scotland, as the trustees, executors, and residuary legatees of Joseph Dawson, late of Carron aforesaid, and a manager of the Carron Company, who died in January, 1850, to bring into the registry the last will and testament of the deceased, or an authentic copy thereof, to accept or refuse probate thereof, and also letters of administration with the will annexed, or to show cause why letters of administration should not be granted to the nominee of Henry Dundas Maclean and his wife, limited to sustain proceedings in the High Court of Chancery, instituted by Colonel Maclean and his wife against the Dawsons and others with respect to the purchase by the deceased from Mrs. Maclean (then Eleanor Carlisle, spinster) of certain Carron Company shares

1859. —a demurrer to such bill having been allowed by reason of
 May 10 & 18. there being no personal representative of the deceased consti-
 tuted by the authority of an English Court.

MACLEAN AND
 MACLEAN
 v.
 DAWSON AND
 OTHERS.

To this citation an appearance was given on behalf of the executors of Joseph Dawson; they declined to take probate of the will in England; and prayed to be heard in act on petition in opposition to any grant of letters of administration being made to Colonel Maclean or his nominee.

The statement in act on petition on behalf of Col. Maclean was as follows:—That the deceased by his will, dated 8th January, 1848, gave to his brothers above named all lands and heritable securities, all his share of stocks in the Carron Company, capital stock of the Bank of England, and all his movable and personal estate upon the trusts thereafter mentioned, and appointed his brothers executors and residuary legatees; that such trust disposition or last will was duly proved in Scotland by the said executors; that the deceased died possessed, besides personal property in Scotland, of stock in the Bank of England standing in the joint names of himself and others for his behoof, but that his will had not been proved in England, and that there was no legal personal representative of the deceased acting under any authority of a Court of Probate in England. That in February, 1859, Henry Dundas Maclean and his wife filed a bill in the Court of Chancery of England against the Dawsons and others, praying that the transfer of certain Carron Company shares made by Mrs. Maclean before marriage to the deceased Joseph Dawson, and now transferred to the names of his executors, should be set aside as fraudulently obtained; that a demurrer to the bill had been allowed on the ground that a personal representative of the deceased acting under the authority of an English Court of Probate was a necessary party to such a suit, and leave given to the plaintiffs to amend their bill; that the citation, as above, had been issued, and that the Dawsons had refused to take probate, etc.

The answer on behalf of the Dawsons admitted their character as trustees, executors, and residuary legatees, stated that the whole of the estate of testator, except certain shares of stock of the Carron Company and certain real property belonging to him in Scotland, had been converted into money

by William and Thomas Dawson (a majority, and, by the law of Scotland, a quorum of the executors), who had from their boyhood resided, and continued to reside, in Scotland; that the trusts of the will, even as regarded legacies, were still unexecuted, owing to existing life-interests, etc.; admitted the purchase in 1839 by the testator, who had been a manager of the company, of ten Carron shares from Eleanor Carlisle, spinster; stated that in December, 1857, at the request of the agents of the plaintiffs, the books of the Carron Company kept at Carron were submitted to the investigation of such agents, who expressed themselves satisfied that the plaintiffs had no claim against the company; that in January, 1859, the agents for the plaintiffs gave notice to the agents for the company of their intention to proceed by summonses of reduction in the Scotch Courts to set aside the purchase of the shares made from the plaintiffs and others; that on the 8th February, 1859, without notice to the defendants, the plaintiffs filed their bill of complaint in the High Court of Chancery in England, praying, amongst other things, that it might be declared that the purchase of the said ten shares by the testator from Eleanor Maclean was obtained fraudulently by him, and that the same ought to be set aside, and that the defendants, or some one of them, might be ordered to transfer ten shares in the said company into the name of the plaintiff; that subsequently the agents of the company were informed by the agents for the plaintiffs that it was their intention, on behalf of several parties other than the plaintiffs, to proceed with summonses of reduction against the defendants in the Court of Session, for the purpose of setting aside other purchases of shares made by the testator; that suits were being duly prosecuted in the Court of Sessions in which the identical questions raised in the Court of Chancery might be raised and determined; that, in particular, one James Balfour had raised a summons of reduction, court-reckoning, and payment against the defendants as trustees and executors, to set aside the sale of six shares made by him in 1839 to the testator; that the conclusions of the said summonses were founded upon allegations identical in substance with the allegations of the bill in Chancery; that the said James Balfour had attached in the hands of the Carron Company the seventy shares of stock be-

1859.

May 10 & 18.

MACLEAN AND
MACLEAN
v.
DAWSON AND
OTHERS.

1859.
May 10 & 18.
MACLEAN AND
MACLEAN
v.
DAWSON AND
OTHERS.

longing to the said testator, and other funds and effects, to the amount of £20,000, belonging to the said trustees and executors in the hands of the company—the effect of such attachment being, that neither the defendants nor the company could in any way legally affect the said shares or other property; that the Court of Session is a court of law and equity, with power to issue summonses for documents and citations against persons in any part of the United Kingdom; that William and Thomas Dawson were resident in Scotland within the jurisdiction of the said Court; that Henry Dawson, though resident in England, was subject to the jurisdiction of the said Court of Session in respect of certain property belonging to him in Scotland; that since the filing of the said bill in Chancery, William and Thomas Dawson had raised, as they were entitled by the law of Scotland to do, a process of multiple-pounding and exoneration, in the names of the said trustees and executors, before the Court of Session (in fact, an administration and distribution suit), in which action they had made the plaintiffs, among others, defenders; that in January, 1852, seventy shares of stock standing in the books of the Carron Company in the testator's name were transferred, in certain proportions, to the names of the three defendants as individuals, but that they had no individual right to such shares or any part of them, unless it should appear in the administration of the estate under the process of multiple-pounding that there was a surplus after the payment of debts and legacies; that William and Thomas Dawson, as a majority of the trustees and executors, had raised a summons in the Court of Session against themselves as individuals and against Henry Dawson and the Carron Company, to compel the transfer of the said shares from themselves as individuals to the names of the said trustees and executors; that the total claims against the estate of the testator by the plaintiffs and others were in respect of seventy-five shares of the said Carron Company, and that, if all such claims were sustained, the trust estate of the testator would be insufficient to satisfy the same; that the Bank of England stock standing in the names of trustees for the testator's behalf had been sold by the trustees since his death, and the proceeds remitted by them to the defendants in Scotland, and that there were no assets whatever of testator now in England;

that the bill in Chancery was demurred to by the defendant Henry Dawson, on the ground that there was no legal personal representative of the said testator in England; that he was only one of three Scotch executors, two being a quorum, and entitled to administer the estate irrespective of him; that the will had been proved in Scotland only; that there was no estate in England belonging to the testator; that neither William nor Thomas Dawson had appeared to the suit filed in the Court of Chancery; that by 15 & 16 Vict. c. 86, the Court of Chancery of England has power, if it shall appear in any suit or proceeding before the said Court, that any deceased person who was interested in the matter in question has no legal personal representative, either to proceed in the absence of any person representing the estate of such deceased person, or to appoint some person to represent such estate for all the purposes of the suit or other proceedings.

1859.
May 10 & 18.

MACLEAN AND
MACLEAN
v.
DAWSON AND
OTHERS.

The reply of the plaintiffs stated that certain important books of the Carron Company were kept at the offices of the company in London and Liverpool; that they had not received full information with respect to the accounts and transactions of the company; that their claim in the Court of Chancery against the executors and residuary legatees of the deceased could not be decided by the proceedings in the Scotch Courts instituted on behalf of parties resident in Scotland; that the demurrer was allowed only on the ground of there being no legal personal representative of the deceased before the Court; that the Master of the Rolls did not consider it a case to which the 15 & 16 Vict. c. 83 applied; that the defendants William and Thomas Dawson had appeared conditionally in the suit in the Court of Chancery, and a motion made on their behalf to discharge the order under which process was served on them had been refused with costs.

On May 10th this case was argued by

Dr. Deane, Q.C., and Mr. Pearson, for the plaintiffs: They relied on the practice of the Prerogative Court of Canterbury to grant administration to substantiate proceedings in Chancery on the mere statement that the representation was necessary, without going into the question of degree of interest, which would, in fact, amount to the Court of Probate arro-

1859. gating to itself the functions of the Court of Chancery. They
 May 10 & 18. cited *In the goods of Chanter*, 1 Rob. 273; and *Davis v. Chan-*
 ter, 2 Phil. 545.

MACLEAN AND
 MACLEAN

v.
 DAWSON AND
 OTHERS.

Dr. Phillimore, Q.C., and *Mr. Cotton*, for the defendants, argued, first, that the class of cases in which the Courts of Probate had been in the habit of making such grants were those in which the Court of Chancery would entertain a suit; but here the whole matter and the parties were fully before a foreign—viz. the Scotch—forum, and the English Court would decline to act; and, secondly, that the 15 & 16 Vict. c. 86, s. 44, gave the Vice-Chancellor power to proceed in the suit, if he thought fit, without the intervention of the Court of Probate.

May 18. SIR C. CRESSWELL, after stating the substance of the petition, answers, etc., as above, gave the following Judgment:—Two objections were urged against the application: first, that in consequence of the legal proceedings instituted in Scotland, the suit commenced in the Court of Chancery was quite unnecessary, and that the Court therefore ought not to assist the parties in maintaining it; secondly, that if there were a proper case for such a grant as that prayed for, the Master of the Rolls would have named a party to represent the estate of the testator under the power given by 15 & 16 Vict. c. 8, s. 44.

I have looked at the shorthand-writer's notes of the judgment delivered by the Master of the Rolls, and he certainly does not intimate that this is not a case for the appointment of a representative, but that the prayer for relief was so framed that it could not be granted without administering the estate of the deceased; that a representative was therefore necessary, and that the case was not within the 15 & 16 Vict. c. 86, as pointed out by Kindersley, V.C., in *Silver v. Stein*, 1 Drew. 295, where that learned Judge says, "The 44th section of the Chancery Practice Amendment Act does not appear to me to apply to cases where the estate to be represented is the very estate which is being administered in the suit; but only to those cases where a certain individual who, when living was interested in the suit and was made a party, has died; and then the Court may either appoint some person to represent that

"party, or may proceed without any representative." Neither Kindersley, V.C., nor the Master of the Rolls, has expressed an opinion that this is not a case in which this Court may with propriety constitute a legal personal representative of the deceased, and the objection comes with a peculiarly bad grace from the defendants, who have actually intermeddled with the property of the deceased in this country, and who ought to have taken probate before they did so.

1859.

May 18.

MACLEAN AND
MACLEAN
v.
DAWSON AND
OTHERS.

The practice of the Prerogative Court, as appears from a variety of reported cases, was certainly to make such limited grants as that now asked for. In *Davis v. Chanter*, 2 Phil. 550, Lord Cottenham explained and vindicated this practice as follows (after reciting the form of the letters of administration in that case): "Of the construction and intent of this authority there can be no question. The grantee was to attend, supply, substantiate, and confirm the proceedings in the cause, and to obey and carry into execution the order and decrees of the Court relating thereto. He was, therefore, in all respects to represent the party of whose estate such letters of administration were granted.

"The only question must be, had the Ecclesiastical Court jurisdiction to grant such an administration? for, if it had, the propriety of its so doing cannot be disputed or discussed in this or in any other Court but a Court of Appeal. It would be the act and decree of a Court of competent jurisdiction, and therefore binding upon all other Courts until reversed. Is there any doubt as to the authority of the Ecclesiastical Court to grant such limited administration? Whatever questions may exist as to the origin of the authority of such Courts over the property of an intestate, it is quite clear that in the earliest times they had the sole right of administering it. The statute 31 Edw. III. c. 11, assumes it in providing that in case of intestacy the ordinary shall depute the nearest and most lawful friend of the deceased to administer his goods; and Blackstone says, that administrators are only officers of the ordinary. The authority vested in the ordinary is, for the purpose of administration, deputed to the administrators in the whole or in part, for, except when regulated by statute or custom, what is to prevent the holder of the unrestricted authority from dele-

1859.
May 18.
MACLEAN AND
MACLEAN
v.
DAWSON AND
OTHERS.

"gating the execution of part to another? and it is the established practice. Administration is granted, during the absence or incapacity of an executor, until the will be received in England or until it be found, for the mere purpose of transferring funds into the name of the Accountant-General, to receive a particular sum, to assign a trust sum, for putting in an answer, or filing a bill in Chancery, or, which is the present case, of substantiating proceedings in Chancery (*Woolley v. Green*, 3 Phill. 215). That this Court will recognize and give effect to such limited administrations appears so clearly from principle that particular authorities could hardly be expected to be found," etc. By sect. 23 of 20 & 21 Vict. c. 77, it was enacted that "The Court of Probate shall be a Court of Record, and such Court shall have the same powers and its grants and orders shall have the same effect throughout all England, and in relation to the personal estate in all parts of England of deceased persons, as the Prerogative Court of the Archbishop of Canterbury and its grants and orders respectively now have in the province of Canterbury . . . and all duties which, by statute or otherwise, are imposed on or should be performed by ordinaries generally, or on or by the said Prerogative Court in respect of probates, administrations, etc., shall be performed by the Court of Probate." If, therefore, the power to make such a grant existed before, it exists now in this Court, and the practice of the Prerogative Court in this respect not having been altered by that statute, or by any rules and orders made in pursuance of it, must be followed according to sect. 29.

It was said by Mr. Cotton, in his ingenious argument, that if this application were granted, the party would, in truth, be made a party to administer the estates of the deceased. If such is its effect, and the defendants are thereby prejudiced, it is their own fault, and they may still protect themselves from any such consequences by now doing their duty and taking probate. With regard to the other answer given to the petition, viz. that the proceedings in Scotland render the suit in Chancery unnecessary, I must leave that point for the decision of the Master of the Rolls. If, in consequence of the Scotch proceedings, the suit in England is improper, his Ho-

nour will assuredly deal with it as it deserves. But I should be assuming to deal with a matter out of my province if I refused to grant the prayer of this petition on the ground that the Master of the Rolls ought not to entertain the suit instituted before him. I think, therefore, that a grant must be made, limited in the usual manner.

1859.
May 18.
MACLEAN AND
MACLEAN
v.
DAWSON AND
OTHERS.

CHARLTON v. HINDMARSH.

Will.—Attestation and Subscription of Witness.—1 Vict.
c. 26, s. 9.

May 18.
CHARLTON
v.
HINDMARSH.

A. acknowledged his signature to duplicate wills in the presence of B., who thereupon attested and subscribed the will. A few hours after, C. being also present, B. suggested the propriety of a second witness; A. thereupon acknowledged the testamentary papers and his signatures in the presence of B. and C. B. pointed out his subscription to C., who wrote his own name; B. then on one of the papers completed, by crossing it, the letter F, being the initial letter of one of his Christian names, which cross he had omitted in the morning; he then on both the papers added the date, "the 17th day of December, 1857."

Held, not to be a sufficient subscription in attestation of the will.

This was a question of law reserved for the decision of the Court of Probate, arising out of facts ascertained on an issue tried before Byles, J., at the Durham spring assizes. The point was, whether there was a sufficient "attestation and subscription" by one of the attesting witnesses under the 9th section of the Wills Act. On the trial a verdict was taken for the defendant, with leave to move, etc.

SIR C. CRESSWELL, on the motion of *Mr. Atherton, Q. C.*, directed an order to issue against the defendant to show cause why the verdict of the jury given for the defendant on the trial of the issues directed by this Court to be tried at the assizes for the county of Durham on the 1st March last should not be set aside, and the verdict entered for the plaintiff, on the ground that, on the evidence given at the trial, it appeared

April 19.

1859.

April 19.

CHARLTON

v.

HINDMARSH.

May 4.

that the alleged will of Joseph Hindmarsh, the deceased, in the cause, was not duly attested and subscribed according to the statute 1 Vict. c. 26.

Mr. Manisty, Q.C. (*Mr. Heath* with him), showed cause.

By the 9th section of the 1 Vict. c. 26, it is enacted "that no will shall be valid unless it shall be in writing, "and executed in manner hereinafter mentioned (that is "to say), it shall be signed at the foot or end thereof by "the testator, or by some other person in his presence and "by his direction; and such signature shall be made or "acknowledged by the testator, in the presence of two "or more witnesses present at the same time, and such "witnesses shall *attest* and shall *subscribe* the will in the "presence of the testator, but no form of attestation shall "be necessary." The question for the decision of the Court is whether Mr. Frederick William Napoleon Wilson, one of the attesting witnesses to the deceased's will, attested and subscribed it in accordance with the requirements of the 9th section of the Wills Act. On the morning of the 17th December, 1857, the deceased, in the presence of Mr. Wilson, acknowledged his signature to both parts of a will, which he proposed to execute in duplicate, and Mr. Wilson thereupon wrote at the bottom, "Witness to the above will and testament and signature. Frederick W. Napoleon Wilson." On the afternoon of the same day Dr. White, having called upon the deceased, Mr. Wilson suggested that he should execute the will in the presence of another witness. The deceased then acknowledged his signature to the duplicate wills in the presence of Dr. White and Mr. Wilson; Dr. White signed his name, and Mr. Wilson retouched his name by putting a cross on the F in "Frederick," and added the date. It is submitted that this is a good execution of the will under the above section. Here the two witnesses *attested* the will, as distinguished from *subscribing* it. (*Hudson v. Parker*, 1 Rob. 14.) Attesting means bearing witness to the fact which the person attesting has to witness. They also subscribed it. It will be said on the other side that Mr. Wilson did not subscribe it on the second occasion. But subscribing refers, not to the witness writing his own name, but to the

will. What is the meaning of the words "shall subscribe the will." They do not mean that the witnesses shall subscribe their names. If such had been the intention of the section, they would have been expressly directed to do so, as the attorney present at the execution of a warrant of attorney or cognovit by 1 & 2 Vict. c. 110, s. 9, is; the words of the section are that "he shall *subscribe his name* as a witness to "the due execution thereof."

1859.
May 4.
—
CHARLTON
v.
HINDMARSH.

In the present case, the witnesses are merely required to do some act in the nature of subscribing upon the will; they must write upon the will. (*Roberts v. Phillips*, 4 Ellis & Blackburn, 450.) Where there is a *bonâ fide* act, and every intention to comply with the law, every presumption ought to be in favour of the validity of that act. Here there is no question of capacity; all we have to make out is, that the witness Wilson did some act upon the will, that is, in the character of an attesting witness. [SIR C. CRESSWELL: You must make out more than that.] If some one else had written Wilson's name, and if he then had put a cross at the end, that would have been enough. Is there any distinction between putting a cross on a letter, or putting it after the letter? [SIR C. CRESSWELL: Does a man subscribe, by dotting an i or crossing a t?] Yes; he does an act upon his signature with the intention of perfecting it. [SIR C. CRESSWELL: That raises a question of fact, whether he did it with that intention.] He then adds a date, and does an act that can be pointed out as visible upon the document. The mark of a witness is sufficient, though another person writes his name. (*In the goods of Ashmore*, 3 Curt. 756.) If a witness puts a mark, though he can write, it is a good subscription. (*In the goods of Amiss*, 2 Rob. 116.) So also if he puts his initials. (*In the goods of Christian*, 2 Rob. 110.) [SIR C. CRESSWELL: *In the goods of Trevanion*, 2 Rob. 311, it was held that writing the word "Bristol," was not sufficient proof of attestation. You must face this difficulty; Is it enough to put a dot over an i, which makes that more plain, which was done before?] We say, that if anything has been done, to which the witness can refer, that is enough. [SIR C. CRESSWELL: He must do something which shall stand for his name.] Wilson says, "I "thought it necessary to have the name complete. My object

1859. "was to make the morning signature a complete signature."
 May 4. Thus we see that he did an act with the intention of perfecting his signature. If that is not enough, where are we to draw the line? Our case is distinct from that of *Playne v. Scriven*, 1 Rob. 770, where no act was done upon the face of the document. We refer also to *In the goods of Clark*, 2 Curt. 329; *In the goods of Byrd*, 3 Curt. 317; *Moore v. King*, 2 Notes of Cases, 45. These cases are distinct, since in them no mark was made on the paper.

CHARLTON
 v.
 HINDMARSH.

Mr. Atherton, Q.C. (Dr. Spinks with him): We admit that initials or a mark resorted to with a given intention will effect a subscription. But whatever form a subscription may assume, it must be a subscription or writing in attestation; it must be made *animo attestandi*. It is obvious that Mr. Wilson did not cross the F in attestation, but with the intention of repairing the omission of the morning. The acts of attestation and subscription must be done at the same time. Mr. Wilson made a subscription in attestation in the morning; in the afternoon he did something to make the subscription in attestation more strictly complete; but it still remained the subscription of the morning. The addition of the date is clearly insufficient as a subscription. He did not intend it to be a signature or subscription indicating the individual, but merely to show the date of the attestation.

Cur. adv. vult.

May 18.

SIR C. CRESSWELL: The question raised in this case was, whether the will of Joseph Hindmarsh had been duly executed as required by the 1 Vict. 26. An issue as to that question was directed to be tried at the last assizes for the county of Durham, where it came on for trial before Mr. Justice Byles. The attesting witnesses were examined, and it did not appear that there was any fact in dispute; whereupon it was agreed that the legal effect of the evidence should be referred to this Court. The verdict was formally entered for the defendant, and the question was argued on a rule to enter it for the plaintiff.

The evidence was thus reported by the learned Judge:—

"Mr. David White, physician, at Newcastle.—December,

"1857, attended Mr. Hindmarsh. First saw Mr. Wilson;
 "conversed with him as to the state of the patient's health;
 "mentioned to me that a will was written, and they were
 "anxious I should witness it, which I agreed to do. I went
 "immediately into his room. The documents (the two wills)
 "were produced to me in the presence of the testator, brought
 "by the housekeeper—Mr. Wilson in the testator's room with
 "me, testator in his bed. I rather think I gave the papers
 "into the testator's hands. I asked him if that was his signa-
 "ture. He asked to be allowed to put on his spectacles, and
 "he examined them. He put them on, examined the signa-
 "ture, and said, most distinctly, 'This is my handwriting,
 "'and that is my will,' in the presence of Wilson and myself.
 "I took the will from his hand, and, to the best of my recol-
 "lection, signed it in that room. I signed both. I do not
 "remember what occurred after that. I remember Mr. Wil-
 "son signing the date, because I requested him to do so;
 "further than that I do not remember. I requested him to
 "put the date.

"Cross-examined.—It is more an inference from the fact
 "that I requested him to do so.

"Re-examined.—I mean that I requested him to put the
 "date; but if I were called on to swear I saw him do it, I
 "should not like to do so.

"Frederick William Napoleon Wilson, surgeon.—In De-
 "cember, 1857, attended Mr. Hindmarsh. I was asked by
 "him to sign his will as a witness, and the will was brought
 "out—both parts. He looked at it, and said that was his will.
 "I wrote at the bottom, 'Witness to the above will and tes-
 "tament, and signature,' and then my name, 'Frederick W.
 "Napoleon Wilson,' on both papers. In the afternoon, Dr.
 "White came into the room; Dr. White examined the patient
 "as to his health. The doctor and I then went into another
 "room, where we had a consultation. I had suggested to
 "Hindmarsh, before we left the room, that he had better have
 "another witness. Dr. White took the will in his hands and
 "went back to the room where Mr. Hindmarsh was. He
 "asked Mr. Hindmarsh if that was his will. I was present.
 "He said, 'Yes, that is my will, and this is my signature,' or
 "something to that effect. At a small table at the head of

1859.

May 18.

CHARLTON
 v.
 HINDMARSH.

1859.

May 18.

CHARLTON
v.

HINDMARSH.

" the bed, close to the bed, Dr. White signed his name. After
" he had signed then I took the papers and went across to-
" wards the window, where there was another table, and sat
" down in an armchair. Dr. White was there; and then,
" after some conversation about the date being added, I dis-
" tinctly remember retouching my name by putting a cross on
" the 'F' on the paper which is uppermost, which is blue;
" and then I added the date in both wills; and then, I believe,
" the documents were both given to the housekeeper.

" Cross-examined.—I very often omit to put a cross at all,
" and where I find it has not been done I always put it. I
" had noticed the omission of the cross. I had always been
" in the habit of supplying the omission; this was merely in
" pursuance of my habit; I thought it better to do so; I did
" not know there were duplicates, I thought I had done so in
" both, but I distinctly remember doing it on the paper that
" was uppermost. I had not detected the omission in the
" second paper. I thought it was better to complete the name;
" I thought adding the date was equal to a repetition of the
" signature. I think I had no other intention; it was by the
" date I intended to repeat my signature; my sole object was
" to supply the omission, to make the name complete. I thought
" it necessary to have the name complete, to make the name
" complete to the will. I was attesting the will, and I thought
" it necessary to have a complete signature. My object was
" to make my morning signature a complete signature.

" Affidavit of defendant and Dr. White referred to, in which
" it was deposed that witness acknowledged his signature already
" affixed there, and that Dr. White told him to write the date.

" " I acknowledged my signature to Dr. White by saying my
" name is there already; that affidavit was sent down ready;
" I was told, as well as Dr. White, that that affidavit was
" necessary to prove the will in the opinion of Dr. Spinks.
" I do not remember seeing Dr. Bousfield.

" Mr. Atherton admits that he cannot dispute the fact that
" the cross was made at the time of the second attestation.

" *Mr. Atherton.*—An acknowledgment will not do, nor go-
" ing over with a dry pen.

" Verdict for defendant.

" Plaintiff to have leave to move; the Court, at the sug-

“gestion and by agreement of both parties, to have power
“to draw an inference of fact, if it be necessary to confer
“any such power on the Court, and if the Court see fit to ex-
“ercise it.

1859.

May 18.

CHARLTON

v.

HINDMARSH.

“J. BARNARD BYLES.”

Now, the words of the statute 1 Vict. 26, s. 9, are that a will to be valid “shall be signed at the foot or end thereof by
“the testator, or by some other person in his presence and by
“his direction, and such signature shall be made or acknow-
“ledged by the testator, in the presence of two or more wit-
“nesses present at the same time, and such witnesses shall at-
“test or shall subscribe the will in the presence of the testator,
“but no form of attestation shall be necessary.”

On showing cause against the rule, it was contended by Mr. Manisty and Mr. Heath, that the witnesses *attested* the will whether they subscribed it or not, for which they relied on *Hudson v. Parker*, 1 Rob. 14; but I doubt much whether, by anything then said by Dr. Lushington, he intended to express an opinion, that attestation could be independent of subscription, the decision there being only that subscription did not necessarily amount to attestation. But it is unnecessary to attempt to explain the precise meaning of the word *attest*, as used in this section; for the question here is, whether both the witnesses subscribed the will after it was acknowledged to them, being present at the same time. A distinction was pointed out between the language of the 1 Vict. c. 26, s. 9, and the stat. 1 Vict. 110, as to warrants of attorney, which requires that the attorney should subscribe his name as a witness, whereas the stat. 1 Vict. c. 26, s. 9, merely requires that the witnesses shall subscribe the will, not prescribing any particular subscription; and it was contended that any act done on the will would suffice as a subscription, although it might not satisfy the literal meaning of that word, for which *Roberts v. Phillips*, 4 E. & B. 450, was cited; but that decision related only to the place where the subscription was written, and not to what might be deemed a subscription, for the witness had written his name at full length. Other authorities also were cited to show that the names of the attesting witnesses need not be written by them on the will. Thus, *In the goods of Anne Ashmore*, 3 Curt. 756, the attesting witnesses made

1859.
May 18.
—
CHARLTON
v.
HINDMARSH.

their marks; so also *In the goods of Robert Amiss*, 2 Rob. 116, they only made marks, although able to write, and in both these cases the attestation and subscription were held to be sufficient: and *In the goods of Christian*, 2 Rob. 110, the subscriptions by initials was held to be sufficient; and the cases of *The goods of Byrd*, 3 Curt. 117, and *Moore v. King*, 2 N. C., were said to be distinguishable, because in neither was any act done upon the will. That observation is not quite correct as to *The goods of Byrd*, for there the witnesses, after the testator signed, put seals against their names, which they had previously written. *Trevanion's case*, 2 Rob. 311, was also said to be distinguishable, because there the only thing done was adding the word Bristol at the end of the name of the witness. On the other hand it was not contended that the witness must subscribe his name: it was admitted that a subscription by initials, by a cross or a mark of any other shape, would suffice if placed there as a subscription *animo attestandi*. But it was argued that the evidence in this case showed conclusively that the witness Wilson did not put the mark across the letter F of his Christian name Frederick, for the purpose of making that mark stand for his subscription; he stated that he considered the addition of the date would make it a new subscription. The date was to give effect to his attestation at that time by making the signature before written equivalent to a repetition of it; the mark across the F was not made for that purpose. And this I take to be the correct view of the case; but the addition of the date could have no greater effect than the addition of the word Bristol in the case of *The goods of Trevanion*, where Sir H. Jenner Fust, in my opinion correctly, held that it was no proof of an attestation to the signature of the testatrix, and that he could not hold it to be an attestation by a witness. And this is consistent with his decision in *The goods of Amiss*, 2 Rob. 116, where he held the marks of attesting witnesses to be sufficient, although they could write, for he there says, "from the affidavit it seems they were made by two of the attesting witnesses for their signatures as attesting the execution." In this case the mark made by Wilson was not made by him for his signature as attesting the execution; at the utmost, it would amount to nothing more than evidence that he adopted and meant to ac-

knowledge the signature which he had affixed in the morning, which would not suffice (*Moore v. King*, 3 Curt. 243). It has been said in several cases that every presumption should be made in favour of a just will; but there is no ground in this case for presuming any other state of facts than that spoken to by the witnesses, and their evidence does not, in my opinion, prove a due execution of the will. The Court was pressed to consider that this strict construction of the statute will have the effect of setting aside a just and proper will. The will may deserve that character, but the duty of the Court is to endeavour to ascertain the true meaning of the words used by the Legislature, and to give effect to them, whatever may be the consequence. The statute was not made for particular cases, and if the provision now under consideration operates hardly in this instance, it may operate beneficially in a hundred others. For these reasons assigned, I think that the 9th section of the 1 Vict. c. 26, was not complied with, and that the verdict must be entered for the plaintiff. The rule will, therefore, be absolute.

Note.—This judgment has been appealed from.

1859.

May 18.

CHARLTON
v.
HINDMARSH.

CROOKENDEN v. FULLER.

November 4.

Will.—Residence Abroad.—Domicil of Origin.—Evidence.—Will in Execution of a Power.—Domicil for the purpose of Succession.—Burden of Proof.

CROOKENDEN
v.
FULLER.

Conversations and declarations, unless accompanying acts, are the lowest species of evidence of a change of domicil; they must not, however, be discarded, but must be duly weighed, together with the rest of the evidence.

For the purposes of succession, where there is an undoubted domicil of origin continued through many years, such domicil will be held to have been retained, unless there is evidence of an intention to abandon it, accompanied by acts sufficient to found the acquisition of a new domicil. The burden of proof is on the party who impugns the domicil of origin.

For the purposes of succession a person can have but one domicil.

SEMBLE, by the law of France, a will made by a domiciled Frenchman during the most temporary residence in a foreign country, would be valid, if executed according to the law of that foreign country.

1859. In this case the plaintiff had called in probate of the will
 November 4. of Mary Ann Crookenden, widow, deceased, which had been
 — granted in common form, and the executors proceeded to
 CROOKENDEN prove it in solemn form. The question was chiefly one of
 v. domicile, and the facts are sufficiently stated in the judgment.
 FULLER.

July 12 & 14. *Mr. K. Macaulay, Q.C., Dr. Addams, Q.C., and Mr. Russell,* appeared for the plaintiff.

The Solicitor-General (Sir H. S. Keating), Mr. Douglas Brown, and Mr. G. Lake Russell, for the defendant.

Cur. adv. vult.

November 4. SIR C. CRESSWELL: In this case, probate of the will of
 Mary Ann Crookenden, widow, had been granted in common
 form. The plaintiff, the only son, and one of the next of kin
 of the testatrix, cited the defendant and William Chamier,
 since deceased, the executors named in the will, to bring in
 the probate and show cause why the will should not be de-
 clared void.

The executors brought in the probate and propounded the
 will, declaring that Mary Ann Crookenden, late of Croydon,
 in the county of Surrey, who died at Montfleury, near
 Cannes, in France, on January 3, 1858, did on the 4th of No-
 vember, 1857, make her will, and signed it in the presence of
 three witnesses, who attested it, etc., and that she was at the
 time of perfectly sound mind.

The plaintiff pleaded, that at the time of making her will,
 and thence until her death, the testatrix was domiciled in
 France, and that the will was not made and executed in con-
 formity with and in manner and form as required for the
 validity thereof by the laws of the empire of France then and
 still in force.

Francis Fuller suggested the death of his co-executor, and
 replied, first, that the testatrix was not domiciled in France,
 as alleged; secondly, that the will was made in conformity
 with the law of France; thirdly, that the will, except a certain
 portion, was made in pursuance of a power contained in the
 last will and testament of her deceased husband, of which the
 testatrix was sole executrix, and which was proved by her in
 the year 1842.

The plaintiff joined issue on the first and second, and traversed the third replication.

The cause came on for trial before the Court, without a jury, on the 12th of July, and again on the 14th, when many witnesses were examined. It appeared in evidence, that the husband of the testatrix died in May, 1842, leaving his widow and four children, two sons and two daughters, him surviving. The daughters were married, one to William Chamier (who died after the commencement of this suit), the other to the Rev. George Lowe, incumbent of Upottery, in the county of Devon. The eldest son died in 1843; the other three children survived the testatrix, and she continued to live with them all on terms of great affection during the whole of her life. The testatrix and her husband, until his death, lived on his estate at Bushford, in Suffolk. That was sold in September, 1842, and she then removed to Woodthorpe, near Wakefield, where her son-in-law, W. Chamier, had taken a house. The testatrix, under her husband's will, took his plate and furniture, which she removed to the house at Woodthorpe, and lived there with Mr. and Mrs. Chamier till the spring of 1844. They all then left; the testatrix warehoused her furniture at Wakefield, and sent her plate to Child's bank in London, with whom she kept her only banking account during the remainder of her life, and the bankers held a power of attorney to receive all money accruing due to her. Her property consisted of £900 per annum from an estate in Barbadoes, £800 per annum, the interest of money in the funds, two shares in the Great Western Railway, money at her banker's, plate, and furniture. In 1844 she went abroad with Mr. and Mrs. Chamier, and spent the winter at Frankfort, and part of the next year at some German baths, and from that time, in consequence of suffering from rheumatism, she always spent her winters abroad at various places, but in general came to England during the summer months. Thus in 1845 she came to England, and remained for some time at Upottery with her daughter, Mrs. Lowe, and she was there again for a considerable time in 1846. In 1845 an additional room was built for her accommodation in Mr. Lowe's house, the expense of which she paid, and that room and one for her maid were always set apart for her use when

1859.

November 4.

CROOKENDEN
v.
FULLER.

1859. there, and the principal part of the furniture in them was her own, but at other times they were occupied by Mr. Lowe's family. When the testatrix was at Upottery she contributed largely to the expense of the housekeeping. In 1846 her son, the plaintiff, returned from a visit which he had paid to the West Indies, and wished to settle in London as a physician, and the testatrix took the lease of a house in Eaton Square, which she gave up to him; the principal part of her furniture was brought from Wakefield and placed there. She never occupied that house, but when passing through London on various occasions, stayed there as the guest of her son. In the summer of 1847 she again came to England, and spent some time at Upottery; the winter of 1847-1848 she passed at Paris, and in the summer came to London to dispose of the lease of the house in Eaton Square. In 1850 she was in England from June till August; the whole of 1851 she spent at Changins, in Switzerland, at the residence of an intimate friend, the Countess St. George, with whom she spent two or three months of each subsequent year of her life till 1857, and the house of the countess she used to call her Swiss home. Part of 1852 she spent in England, at Upottery, and when there paid all household expenses except servants' wages. During this year she suffered very severely from rheumatism and sciatica. The whole of 1853 she remained on the Continent, and passed the winter of that year at Cannes, in company with the Countess St. George, occupying part of the house of a Mons. Girard. In 1854 she was in England from August to November—part of the time at Upottery—then returned to the Continent with Miss Anna Lowe, and spent the winter at Hyères, in lodgings. Her son, the plaintiff, was also at Hyères, at an inn. In 1855 she came to England with Miss Lowe, remained until November, and then returned to France, and went to reside at Montfleury, at Cannes. In the spring of 1855 the plaintiff had made a contract for the purchase of a property called Montfleury, on which there was a dwelling-house. He had seen the property in the winter of 1853, when his mother was at Cannes, and she admired it, but no contract was then made, as he thought the owner asked too high a price. In making this purchase, he was encouraged by his mother, who

November 4.
CROOKENDEN
v.
FULLER.

wrote to him on the subject from Hyères on the 10th and 13th of April.

In the letter of the 10th of April, apparently alluding to some arrangement about the house, she says:—

“As things done cannot be undone, we must make the best of the old lady and her son. For the next year things must remain as they are, and no alterations, new furnishing, or building attempted whilst they are occupants of the house.” Suggesting there was some desire to have this property secured, and that there was some difficulty about it:—

“By the time they leave it is to be hoped the money will have come in from the West Indies. I wrote on Monday to Child’s house, asking if they would advance me on loan £500, and taking my Candle shares as security. If, as I expect, they consent, my Exeter Bonds will enable me to make over the £1,000 at once, or as soon as you may require it; and I promise I will also hand you the second sum of £1,000, as soon as Robertson pays me, requiring no payment of interest; but at my death the capital to be repaid on that event to my executors. I can perfectly well do without a carriage or horses, and walking exercise is good for my health. It is because I have found lodgings particularly disagreeable in the south of France, that I had resolved to have a place to myself, and not to be where I am, almost poisoned by foul air.” The rest of the letter I think is not material. The letter of the 13th of April is to this effect. After some congratulations, she says:—“I lost no time in writing to Child, and despatched my letter to them on the 9th, as I shall certainly have a letter in good time to draw on them for £1,000; but I shall hope to see you at Cannes before the time of payment becomes necessary. I will now tell you what are my intentions respecting you. I propose paying you £100 per annum, so long as I continue to occupy the upper part of your house, commencing, if you please, from the 1st of October next. And if it will be a convenience to you to have 1,500 francs in advance, I will pay you that sum when I meet you at Cannes, but I would rather have nothing to do with monthly payments of rent,” etc. The rest of that letter also, I think, is immaterial.

1859.

November 4.

CROOKENDEN

v.

FULLER.

1859.
November 4.
CROOKENDEN
v.
FULLER.

The testatrix lent her son the two sums of £1,000, each mentioned in the letter of the 10th of April, and he gave a promissory note for them. The plaintiff and his wife settled at Montfleury in September, 1855, and the testatrix joined them in November, and occupied the upper part of the house, according to her proposal made in the letter of the 13th of April. The house, when purchased, was partially furnished, and the testatrix bought other articles to make it more complete. She kept a lady's-maid, butler, cook, and scullery-maid. Until February, 1856, she and her son's family took their meals together, but then ceased to do so. In the summer of 1856 she left for Switzerland, taking her lady's-maid with her, but leaving the other servants at Montfleury. Before leaving Montfleury she told her son that she intended bringing back friends with her, and that she should want more room, and arranged with him that she should have the whole house, except one room; and he, in consequence, made an addition to a cottage adjoining to accommodate his own family. During the spring of 1856 the testatrix said that the house was too small, and she had to go up and down stairs too much, and she proposed making additions to it, for which plans were prepared by an architect, but that intention was abandoned, as her friends advised her to build an independent house. Plans were prepared accordingly for a house on her son's property at Montfleury, all on one floor, as she thought that would be best adapted to her increasing years and infirmities. On the 30th of July, 1856, while staying with the Countess St. George at Changins, she addressed a letter to her son, which was given in evidence.

There seems to have been some misunderstanding as to an expression which had been used by her lady's-maid, as if he was guilty of some unreasonable delay in building the house. She says, "I am quite sure you have done all in your power to accelerate the works at Montfleury, but the unfortunate want of water must have retarded them, it cannot be helped. What the unfortunate 'elderly lady's-maid' meant was, that we should never live to occupy the new house; to which observation I replied, 'You give me then but a short time to live; pray speak for yourself.' Only it had no reference to building the

"house, etc. etc. And now for more important matters in which I trust no mistake can arise. Finding that there existed no probability of getting money from old Robertson, and considering it very desirable that Bréquêt should receive his second large instalment, I have sold out my Candle shares, to have it in my power to place £1,000 at your disposal. This sum will so far diminish your debt to Bréquêt as not to deprive you of all your small income, which appeared to be the case with your last payment. You need not send me any acknowledgment for this loan, it will be time enough when we meet." I do not think there is anything else material. It appears that she had been writing before about the new house which was in progress.

1859.
November 4.
—
CROOKENDEN
v.
FULLER.

The winter of 1856-1857 she passed at Montfleury, occupying, with her friends, the whole of the house, with the exception before mentioned, the plaintiff and his wife occupying the excepted room and the adjoining cottage. In February, 1857, an agreement was entered into between the testatrix and her son, with regard to the new house which had been commenced on part of the estate purchased by him, and was then four or five feet above the ground. By this agreement it appeared that she was to find money for the building; that as to 25,000 francs he was to render no account, but for any further sums required he was to give notes payable, without interest, to her representatives after her death. The house had not been finished at the time of her death, and after that time, nothing further was done to it.

In May, 1857, she received at Montfleury a letter from Mr. Randall, a solicitor in London, whose firm had for many years been her legal advisers.

" May 29, 1857.

" Dear Madam,

" You will recollect that in the month of October, 1854, you made your will in the English form. There has recently been a decision of the Privy Council that English persons domiciled (as it is said) abroad, that is, permanently settled abroad without the intention of returning to England, must make their wills according to the laws of the country where they happen to be domiciled, so far as personal estate is concerned, and not according to the laws of England. The time

1859.
November 4.
—
CROOKENDEN
v.
FULLER.

of the domicile at the death of the party is the test to be applied to the validity of the will, and not the period when the will was made, and the property being in England makes no difference. This decision has caused a good deal of well-founded concern in the minds of English persons residing abroad.

"I should therefore be much obliged to you to inform me whether you intend to reside permanently abroad, or whether you have any intention of returning to England.

"With reference to your will, I also take the opportunity of inquiring whether you intend it to operate as a power of appointment over the property secured to you by your late husband's will; as, if so, it may be desirable, in consequence of some recent decision of the Courts, to make it refer more specifically to the power of disposal given to you thereby. If not, it will do as it is, supposing you have enough property to answer the legacies given. The power in Mr. Crookenden's will does not enable you to leave the property in which you have a life-interest to others than your children and grandchildren, etc. etc. I remain, etc.,

"JN° RANDALL."

To which she replied :—

"Montfleury, près Cannes, Var.

"Dear Sir,

"I am in the receipt of your favour of the 29th ult., and learn by it that the late decision of the Privy Council respecting the wills of English persons resident on the Continent must be conformable to the laws of the country in which they reside, the absurdity of which is apparent to the meanest capacity. A will therefore made by a person resident in China must, by the same rule, be amenable to the Chinese laws, or in any other remote part of the earth. I think it would be advisable to have an interview with you on the subject. My visits to England would probably be annual, as long as health and strength is granted me, but I suppose I must be considered as living in France, spending seven or eight months yearly in that country. Hoping, therefore, to see you as soon as I can make arrangements for leaving this place, which I hope may be early in the next month, and of which I will give you early notice, believe me, etc. etc.,

"MARY ANN CROOKENDEN."

The testatrix came to England on the 2nd July, and during her stay there in the month of October, Mr. Randall, by her direction, caused a new will to be prepared, which she duly executed, so as to satisfy the statute 1 Vict. c. 26, at the house of her brother, Colonel Fuller, at Croydon, in whose custody it was left, with other papers, amongst which was the promissory note for £2,000. Amongst her papers, after her death, a codicil was found in her own hand-writing, signed by her, purporting to be attested by two witnesses.

That codicil is of some importance. It bears date the 26th of October, 1855, and is in effect as follows :—

“ I declare this to be a codicil to my last will and testament. I desire that my executors will not claim the arrears of income due to me at the period of my decease, from the West India estates, beyond such a sum as may be necessary to pay the legacies which I may leave. As I have given no directions respecting my funeral in the will I executed on the 24th of October, 1854, I desire now to express my wish to be buried at Upottery, in the same vault, or as near as may be, to my dear son Edward, and every unnecessary expense should be avoided, incurring only those which are consistent with respectability. If a hearse and mourning-coach is necessary, I desire that only one coach should be used; the plainest head-stone, with my name and age, to be put up. In lieu of any tablet to my memory, I desire that an obituary-window should be put up in the west window of Upottery Church, the value of which must not exceed £50,” etc. etc. Then she provides for giving certain sums to the members of the Fuller family, and a necklace and other small gifts to different persons. The existence of this codicil was not known until after her death.

When the new will was executed, she destroyed the former will made in 1854. The testatrix, when in England, spent some time, about two months, at Upottery with her daughter, Mrs. Lowe, and expressed a hope that she should be able to come and pay her a longer visit in the next year. She returned to Cannes in November, and died there, January 3rd, 1858. In the summer of 1857 some considerable repairs were done to the house at Montfleury by the

1859.
November 4.
—
CROOKENDEN
v.
FULLER.

1859.
November 4.
—
CROOKENDEN
v.
FULLER.

directions of the testatrix, and were paid for by her executors. During the same summer she caused some of her furniture to be brought from England, and at Montfleury expressed satisfaction at having old favourite things about her. Such were the principal acts done, according to the evidence before me, from which an inference may be drawn as to the domicile of the testatrix.

But, in addition to them, each party gave evidence of conversations and declarations, which, unless accompanying acts, have, I think, been properly described as the lowest species of evidence. They must not however be discarded, but duly weighed, together with the rest of the evidence adduced.

In support of the allegation that her domicile was French, it was proved that in the summer of 1856, when at the house of her friend the Countess St. George at Changins, when speaking of building a new house at Montfleury, she said, "You know I have no home in England;" that to Mrs. Crookenden, wife of the plaintiff, she always spoke of Montfleury as her home from her first going there, and as the place where she meant to live all her life. To Mr. Dimes, a gentleman living at Cannes, she said, early in 1857, that she should be glad when the new house was finished, for then she should have a comfortable home of her own; and when about to depart for England, she said she must go there on business, and would then arrange to have her furniture sent over, as English furniture was better than French, and having her old furniture about her would revive agreeable recollections; that when her house was finished she should have room to receive her friends, and that would prevent the necessity of taking long journeys, which she found fatiguing. Another witness, Eliza Williams, stated that she travelled with her to Cannes in October, 1855; that on one occasion afterwards, when going to Nice, she said she was glad that it was arranged for her son and herself to settle at Cannes, for it suited her better than Nice, and she was glad he had not resolved to settle at Nice; and that she wished to be near him the remainder of her days. Mary Ann Patteson proved that she accompanied the testatrix from England to Cannes in the autumn of 1857, and she was taken very ill on the journey. During the journey she said she hoped always to live at

Cannes, and said the witness was under a mistake in supposing that she could not live at Cannes as comfortably as in England, and that she intended doing so. Ellen Coleridge proved that when the testatrix was on a visit to her daughter, Mrs. Lowe, at Upottery in 1857, she spoke of the house she was building at Cannes; the witness expressed surprise that she should build at her age; to which she replied, "Oh people always do so abroad, it is so difficult to get houses." The plaintiff deposed that in 1856, in a conversation at Cannes with his mother and others about the mode of disposing of the bodies of the dead, he expressed himself in favour of burning. She observed, "Don't have me burned; I should prefer lying on the hill;" alluding, as he supposed, to a cemetery there. Augustin Borniol, British Vice-consul at Cannes, stated that he became acquainted with testatrix in 1851; that in January, 1856, she told him she had participated in the purchase of Montfleury with the intention of fixing her residence there till the end of her days; that after the decision of the case of *Bremer v. Freeman*, she expressed much anxiety about her will, and asked his advice upon the subject, saying that she must be considered as domiciled in France; whereupon he advised her to make one that would be legal both in France and England, and explained how it might be done.

On the other hand, Emilia Fuller (wife of the defendant) proved that the testatrix for many years suffered from rheumatism and sciatica; that she often said that the climate of England was so cold during the winter that she was compelled at that season to reside in the south of France; that when in England in 1857 the testatrix said that one of her reasons for coming to England was to make a new will, for some fresh case made her fear that her property would not be distributed according to English law; that she was very fond of the climate of the south of France, but was also very fond of Upottery, and of being there with her grandchildren, and wished she could reside there with safety to her health. Charlotte Fuller, daughter of defendant, proved that she had frequently accompanied the testatrix abroad for the winter since 1843; that she always spoke of her preference for England over France, and regretted that

1859.
November 4.
CROOKENDEN
v.
FULLER.

1859. she could not live there; that she went to Cannes in the autumn of 1856, and remained with testatrix till June, 1857; that at Montfleury there had been conversations about the decision of the Privy Council in *Bremer v. Freeman*, and in June testatrix said she should go to England and make a new will. In the winter of 1856-1857, testatrix told the witness that she had only taken such things abroad as she wished to leave there, and that the more valuable part of her property remained in England. She mentioned having furniture at the rectory at Chelsea and Upottery, and plate at her banker's, and said that she had taken a very small portion abroad, but took plated articles instead, and sometimes borrowed of her son. The Rev. George Lowe, her son-in-law, stated that when the testatrix was with him in 1855, at Upottery, she expressed a wish to spend the winter at the vicarage, but thought it impossible, on account of her health. She also said that she much wished to be buried in Upottery churchyard, where her son had been buried, and that she would leave directions that it should be done. She pointed out a place where she wished a vault to be made, and her son's body to be removed to it. In July, 1857, when again at Upottery, she said she understood from Mr. Randall that it was necessary to come to England to make her will, so as to meet the French law; that she could not understand what they meant by saying she was domiciled in France; that she was not so, that she merely went abroad on account of her health, and that, according to that law, a person travelling would have to make a will according to the law of the country where he happened to be at the time. When about to leave Upottery for Chelsea in September, 1857, she said that she hoped certainly to return in June, 1858, and observed that the house wanted the outlay of a good deal of money, and added, "We will do that when I return next year." The Rev. Thomas Drosier, who had frequently in former years seen the testatrix at Upottery, met her there in 1857, when she told him she was going to London to consult Mr. Randall about her will, and that if there was any danger of her property being disposed of according to French law, she would never set her foot in France again. Ellen Reeves, who had been governess in the family of testatrix,

November 4.

CROOKENDEN
v.

FULLER.

and on intimate terms with her for many years, stated that she passed several winters with her on the Continent, and in 1856 accompanied her to Cannes, and remained there till May, 1857. During the winter she spoke of the pleasure of being with relations, and said that, as her health improved, she hoped she might be able to try a winter in England. She often spoke of admiring Upottery, and of the pleasure it gave her to be there with her son and his family, and said that if she could choose her residence she should live there entirely. The witness saw her at Croydon in October, 1857, when she said she was obliged to go to a milder climate in consequence of her rheumatic complaints. Fanny Lydiard, a connection of Mrs. Kingsley, the wife of the rector of Chelsea, stated that the testatrix came on a visit to the rectory about October, 1857; that Mrs. Kingsley was absent, and witness had to entertain her; that they conversed intimately about her affairs; that she accompanied her several times to Mr. Randall's, but was not present at their interviews. She told witness that she had been very unhappy about the new law, and was going to alter her will in consequence, before she returned to Cannes for the winter, and added that she should never forsake her country.

Upon the second issue, viz., whether the will of the testatrix was made in conformity with the laws of the empire of France, one witness only was examined, the Chevalier François de Rosay, who had for many years practised as an advocate in Paris. He stated that if a Frenchman, born in France, and who had lived there all his life, were to go to London for a day and there make a will good according to English law, that will would, by French law, be good; and that the same rule would apply to the case of an Englishman born, who had forsaken his domicile of origin, and become domiciled in France. In support of his opinion so expressed the witness referred to Dalloz, Rep. 1843, 1st pt. p. 208, from which he read the following passage:—"In order that a will made by a Frenchman in a foreign country be reputed as made by authentic act, it is sufficient that the formalities used in that country have been observed, though no public officer have been employed, if the intervention of a public officer is not required by the law of that foreign country." And he referred also to the

1859.
November 4.
CROOKENDEN
v.
FULFEB.

1859. report of a case where it had been so held by the Court at
 November 4. Rouen, and the decision affirmed on appeal; and this agrees
 with the opinion said to have been given by Senard (an advocate of the Cour d'Appel in Paris) in the case of *Bremer v. Freeman*, 10 Moore, P. C. 324.

CROOKENDEN
 v.
 FULLER.

Upon this state of facts three points were urged for the defendant in support of his claim to probate: first, that the testatrix never abandoned her domicile of origin, and was, therefore, at the time of her death at Cannes domiciled in England, and consequently her will made in conformity with the statute 1 Vict. c. 26 was valid; secondly, that according to the evidence of François de Rosay, which was wholly uncontradicted, even assuming the testatrix to have become domiciled in France the will was nevertheless good; and thirdly, that as far as it was an execution of a power given by the will of her deceased husband, the rule that the will must be according to the law of the domicile did not apply, for the rule was founded on the maxim *mobilia sequuntur personam*, which could not be applicable to an instrument which merely executed a power over certain property given by another person.

It seemed to me at the time that this third point could not be sustained, for that I could only grant probate of that which is a will, and if a will, it must be a will duly executed, and I can only recognize that as a will duly executed which is in conformity with the law of the domicile; and to this opinion I adhere.¹

In dealing with the first point raised, namely, that the domicile of the testatrix was English, I have only to consider domicile for the purpose of succession. I do not pro-

¹ In a subsequent case brought before the Court on motion, "In the goods of S. E. Alexander, deceased," Sir C. Cresswell stated that he had ascertained that the opinion above expressed was erroneous, being contrary to that given by the Judicial Committee of the Privy Council in *Tatnall v. Hankey*, 2 Moore, P. C. 342. The point is mentioned in the marginal note to Mr. Moore's report of that case, but that is not supported by the judgment as published by him. The opinion of the Judicial Committee was reported to the Crown in these words:—"That the validity of the will of the said H. D., deceased, so far as regards the *appointment* of the residue of the personal estate of the said C. B., deceased, does not depend upon the law of the domicile of the said H. D., at the time of her decease."

pose to try the question by a reference to any of the definitions of domicile given by foreign jurists. The very learned and elaborate judgment of Kindersley, V.C., in the case of *Lord v. Colvin*, 28 L. J. 361, shows that none of them would be safe guides in this case; and, indeed, they are all disposed of in a very summary manner by Lord Cranworth in *Wicker v. Hume*, ib. 396, H. of L. The principles upon which the case depends are clearly stated in the judgment of the Master of the Rolls in *Somerville v. Somerville*, 5 Ves. 786: first, that a man can have only one domicile for the purpose of succession; secondly, that the original domicile, or, as it is called, the *forum originis*, or the domicile of origin, is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile and taking another as his sole domicile; and this rule has been reaffirmed in several modern cases. (*Munro v. Munro*, 7 Cl. & F. 842; *Collier v. Rivaz*, 2 Curt. 855; and *Hodgson v. De Beauschesne*, P. C. December, 1858; 33 L. T. Rep. 36.)

1859.
November 4.
CROOKENDEN
v.
FULLER.

Now in this case there is no doubt that the domicile of origin of testatrix was English, and, according to *Somerville v. Somerville*, that must prevail, unless she acquired another, and also manifested and carried into execution an intention to abandon her former domicile. Upon this subject, and upon the nature of the evidence necessary to establish such a case, I think the language of Kindersley, V.C., in *Lord v. Colvin*, is well worthy of attention: "In truth, to hold that a man has acquired "a domicile in a foreign country is a most serious matter, involving, as it does, the consequence that the validity or invalidity of his testamentary acts, and the disposition of his "personal property, are to be governed by the laws of that "foreign country. No doubt the evidence may be so strong "and conclusive as to render such conclusion unavoidable; "but the consequences of such a decision may be, and generally are, so serious and injurious to the welfare of families "that it can only be justified by the clearest and most conclusive evidence."

Let us see, then, what evidence there is of the acquisition of a new domicile, or, as Lord Cranworth describes it, "permanent home," by the testatrix. From 1844 till her death

1859.
November 4.

CROOKENDEN
v.
FULLER.

she had no home in England, and in consequence of rheumatic affections, she always passed the winter abroad, in general returning to England for the summer months, which she spent with different friends, but sometimes she remained abroad throughout the year. From 1844 to 1853 she had no residence abroad which could in any sense be considered as fixed or permanent, and there was no evidence whatever of the acquisition of a foreign domicile. In 1855 she encouraged her son to purchase the property of Montfleury, at Cannes, and assisted him to do so by a loan of £2,000. This was relied on by the plaintiffs as evidence of an intention to fix her residence permanently there, and to relinquish her English domicile; but her letters of the 10th and 13th of April, 1855, furnish arguments to each side. Thus, in the letter of the 10th, she speaks of the arrangements as to alterations, furnishing, etc., to be done at Montfleury, as if it was the concern of both: and further on: "It is because I have found lodgings so particularly disagreeable in the south of France, that I had resolved to have a place to myself, and not to be where I am almost poisoned by foul air;" from which it may be inferred that she intended to establish herself permanently at Montfleury. But, on the other hand, that property was not purchased by her, but by her son, and was conveyed to him. She lent him £2,000 to help him to pay for it; but that was to be repaid by him to her executors, and he gave her a promissory note for it; and with regard to her resolution to have a place to herself, it may well be that she meant it, not as a permanent residence throughout the year, but in substitution for the lodgings which she had been in the habit of taking at various places for the winter months. Again, in the letter of the 13th of April she speaks of the arrangements as to having possession of Montfleury as his business; and then proceeds to state what are her intentions towards him: "I propose paying you £100 per annum as long as I continue to occupy the upper part of *your* house, commencing, if *you* please, from the 1st of October next." She offers to pay a sum in advance, but adds: "I would rather have nothing to do with monthly payments of rent, etc.;" and this was relied on for the defendant as showing that the testatrix did not mean to make any permanent arrangement, but only to pay as long as she continued at Cannes, contemplating the pro-

bability of ceasing to occupy the apartments agreed for. The meaning of these passages in her letters may be doubtful. She may have meant to say that she intended to reside altogether at Montfleury, or that she should always resort there in the winter, instead of passing it sometimes at one place and sometimes at another, as theretofore. But upon the other branch of the question, viz. whether the testatrix had manifested and carried into execution an intention of abandoning her former domicil and taking Cannes as her sole domicil, the codicil produced is very material evidence. The place where it was made was not proved, but it bears date the 26th of October, 1855, and was therefore probably made just before she commenced her journey to Montfleury to take up her abode there, and tends strongly to show that she did not, by concurring in that purchase and making arrangements to occupy a part of the château, intend to abandon her domicil of origin; and this codicil is in exact conformity with the conversation spoken to by Mr. Lowe as to her desire to be buried at Upottery, and, by proving his correctness in that particular, tends to confirm his evidence as to her statement that she much wished to pass the winter at Upottery, but could not on account of her health. It is to be remarked that she does not appear at any time to have relinquished her wish to be buried at Upottery, for when the will now in question was made the will of 1854 was destroyed, but this codicil was preserved and found amongst her papers after her death. On the other hand, her son, the plaintiff, spoke of a conversation he had with her in 1856, at Cannes, as expressing a desire to be buried in the cemetery at that place; but it seems to me that very little reliance can be placed upon it. In a casual conversation respecting the various modes of disposing of dead bodies which had been adopted by different nations, Dr. Crookenden expressed an opinion in favour of burning, upon which she said, "Don't have me burnt; I should prefer lying on the hill," where the cemetery was situate. From such an expression, used under such circumstances, I should infer nothing more than that she had rather her corpse should be buried than burnt. Upon this evidence I am of opinion that the plaintiff has failed to establish that, when the testatrix took up her abode at Montfleury in November, 1855, she had either ac-

1859.

November 4.

CROOKENDEN
v.
FULLER.

1859. quired a French domicil, or manifested an intention of abandoning her domicil of origin.
November 4.

CROOKENDEN
v.
FULLER.

Having spent the winter of 1855-56 at Cannes, she left as usual early in summer, and went to Switzerland, and as she wished to have friends with her during the next winter, she arranged with her son for the occupation of the whole of the château, with some rather trifling exception, and several friends spent the winter with her there. During the preceding winter testatrix complained that the accommodation in the château was not sufficient, and that she had to go up and down stairs more than suited her. At one time alterations and additions were proposed, but afterwards she arranged for the construction of a new house all on one floor, on her son's property at Montfleury, and on the 14th of February, 1857, the agreement already stated was made between them. The house had been commenced and was in progress when she received Mr. Randall's letter of the 29th of May. The next point to be ascertained is, whether between the time of her leaving Montfleury for Switzerland in 1856 and the receipt of that letter, she had done anything to change her domicil. The arrangement for occupying nearly the whole of the château, and having her friends during the winter, is in my judgment quite insufficient for that purpose. The agreement with her son to build another house for her use, and to pay a large sum towards it, is certainly evidence of an intention to settle there permanently; but it may have been merely with a view to passing her winters there, and at all events rather refers to some purpose to be executed in future than any present determination to remain there and relinquish all connection with England. Her conversation with Mr. Dimes has that aspect. Mons. Borniol, indeed, said that when the case of *Bremer v. Freeman* and the effect which the decision might have upon her will was discussed, she said she must be considered as domiciled in France. But it is difficult to discover what she then meant by the term domiciled. In her answer to Mr. Randall's letter, she uses the word "reside," and in answer to his inquiry whether she meant to reside permanently abroad, she says, "My visits to England will probably be annual as long as health and strength is granted to me; but I suppose I must be considered as living in France, spend-

“ing seven or eight months yearly in that country;” and probably she meant the same thing by her expression to Mons. Borniol. But had she in this manner and to this extent resided in France, intending to abandon her former domicile and take another (viz. at Montfleury) as her sole domicile? Considering her act in coming to England, and making a will there for the express purpose of preventing the distribution of her property according to French law, although she had been told that her will must be made according to the law of her domicile, her conversation with her son-in-law, Mr. Lowe, when she said, “She could not understand what they meant by “saying she was domiciled abroad, that she was not so, but “merely went abroad on account of her health;” her declaration to Mr. Drosier that if there was any danger of her property being disposed of according to French law she would never set her foot in France again; her declaration to Miss Lydiard, who accompanied her to Mr. Randall’s office, that she should never forsake her country; I cannot come to the conclusion that she had then abandoned her domicile of origin, or so fixed her residence in France as to render the loss of that domicile a necessary consequence. These declarations were followed by the execution of a will, in which she described herself as of Croydon, late of Camden-town, never mentioning France; and it is impossible to suppose that, if she had not already changed her domicile, she then intended to do so; and her conversation with Ellen Coleridge in August, 1857, and with Mary Ann Patteson during and at the end of her journey back to Cannes, when she expressed her thankfulness at being at home, must be construed with reference to such a home and such a residence there as would be compatible with her retention of her English domicile. The burden of proof of this issue is on the plaintiff, and although he has adduced a good deal of evidence tending to establish the affirmative, that has been met by evidence of such a nature tending to a contrary conclusion that I feel it impossible to say that the testatrix ever *animo et facto* abandoned her English domicile and acquired another in France.

Upon the first point, therefore, my opinion is, in favour of the defendant.

Upon the second question, viz. whether the will in question

1859.

November 4.

CROOKENDEN

v.

FULLER.

1859. was made in conformity with the laws of France, the evidence
 November 4. was all on one side. I am bound to deal with the law of
 France as a question of fact to be ascertained as any other
 fact in dispute. Now, the Chevalier de Rosay, an experienced
 French advocate, deposed that, according to the law of France,
 the will is good, assuming the testatrix to have been domiciled
 in that country. No conflicting evidence was given, and if
 the matter had rested there, I should have been bound to act
 upon the evidence so given. But the Chevalier confirmed his
 opinion by reference to Dalloz, and a decision expressly in
 point affirmed on appeal. Upon this question also I must
 therefore decide in favour of the defendant.

CROOKENDEN
 v.
 FULLER.

The result is, that the Court pronounces for the will, and
 orders the probate to be delivered out to the surviving ex-
 ecutor.

April 27 and
 May 4.

HAYNES v. MATTHEWS, in the Goods of STEPHEN CLARK
 (deceased).

HAYNES
 v.
 MATTHEWS.

*Married Woman sole Next of Kin.—Application of Creditor.—
 Husband's Right to Administration.*

The husband is entitled to take out administration in right of the wife,
 to her next of kin deceased intestate, and her renunciation in favour
 of a third person, *e. g.* a creditor of the deceased, will not deprive
 the husband of his right:

SEMBLE, a creditor applying for administration has no right to go into
 the question of the unfitness of the next of kin to administer.

In this case, Stephen Clark died on the 18th of October,
 1858, a bachelor and intestate, entitled at the time of his
 death to both real and personal property, leaving his sister,
 Ann Matthews, the wife of George Matthews, his heiress and
 sole next of kin. In November a citation was extracted on
 behalf of Thomas Haynes, claiming as a creditor of the de-
 ceased, and served on Mrs. Matthews and her husband. An
 appearance to this citation was entered for the husband, and
 the question came before the Court on motion on February
 the 16th, when, in consequence of the facts disclosed in
 various affidavits of the parties, the Court refused to make

any decree, and directed the question to be brought before it by petition. Among the affidavits was one by Mrs. Matthews, expressing her consent, so far as she was able, to administration being granted to Thomas Haynes, whom she believed to be a *bond fide* creditor of the deceased in the sum of £100 and upwards; and counsel on her behalf consented to the grant being made, on which the Court observed that Mrs. Matthews could henceforth be no party to the suit.

Thomas Haynes, in his petition, claimed administration as a creditor in the sum of £100 and upwards, for money lent and advanced to the deceased, and for wages due; he stated the value of the estate to be about £4,000, and that he was willing, at the request of Mrs. Matthews, to take upon himself the administration and to give due security; that Ann Clark and George Matthews were married in July, 1844, and lived together upwards of nine years at Chipping Norton, carrying on a grocery business; that there were two children, aged eleven and eight years, both now dependent on the mother for their support; that by indenture of 31st July, 1852, Matthews, for the considerations therein mentioned, assigned to Clark, his executors, etc., his household furniture, stock-in-trade, etc., in his business of grocer, and all debts owing, and the goodwill; that Haynes, the petitioner, was engaged by Clark to manage this business, and that since February, 1853, Mrs. Matthews and Clark had together conducted the business down to the present time; that George Matthews was not a proper person to be entrusted with the administration, because he had, since the 1st of October, 1853, deserted his wife and children; that by a certain indenture of the 1st of October, 1853, between George Matthews, of the one part, and Stephen Clark, of the other, Matthews agreed (amongst other things) to live apart from the said Ann Matthews, and to allow her the custody of the children, and that this arrangement was rendered necessary by the misconduct and cruelty of Matthews to his wife; that since October, 1853, Matthews had contributed nothing to the support of his wife and children; that after the separation, Matthews had squandered what money he received from Clark under the indenture of October, 1853, by intemperate and irregular living, and after being an inmate for some weeks of the Union-house at Chipping Norton, en-

1859.

April 27 and
May 4.HAYNES
v.
MATTHEWS.

1859. listed in the army, and was supposed to be now a corporal in second battalion Coldstream Guards. The petition further
 April 27 and May 4. went into some points supposed to arise out of an indenture of settlement of the 19th of July, 1844, in contemplation of the marriage of Ann Clark and Matthews, and out of other covenants, etc., in the indenture of October, 1853, which did not seem to affect the question now at issue. The answer, on behalf of Matthews, in substance insisted on his beneficial right as husband to the intestate's sister; denied the right of Haynes as a creditor to enter into the question of his (Matthews) fitness or unfitness, and stated that since August, 1855, he had been assistant-schoolmaster in the second battalion Coldstream Guards, and since January, 1856, full corporal thereof.

HAYNES
 v.
 MATTHEWS.

This petition was argued by *Dr. Phillimore*, Q.C., for the creditor.

Dr. Spinks, for Matthews, cited *Wenham v. Wenham*, 6 N. C. 17. *Cur. adv. vult.*

May 4. SIR C. CRESSWELL: This is a petition by Haynes for administration to Stephen Clark, deceased. He claims on two grounds; first, as nominee of the next of kin, Clark's sister, a married woman: and, secondly, as creditor. As regards the first character, according to the ordinary practice, if the wife renounces, the grant is made to the husband, for he has an interest, and the grant must follow the interest; and the wife cannot by renouncing deprive her husband of his right to the grant. In this case, the marriage-settlement and a deed of separation have been referred to, but I am not aware that they affect the present question. As to his claim as a creditor, that only can avail when the next of kin renounce, and the estate is likely to be unadministered. If, indeed, an estate is insolvent, it may be said that the next of kin has no interest, but that is not so here. The husband is the person next entitled after the wife to this grant, and is willing to take it. Lastly, the 73rd section of the Probate Act was invoked, but it is wholly inapplicable to such a case. There is no absence of persons entitled to administration, and

no insolvency; it would be a mere arbitrary selection on the part of the Court. The husband is entitled to administration, and with costs.

1859.
May 4.

In the Goods of JOSEPH LEESON (deceased), on Motion.

November 16.

Administration.—Attorney of Next of Kin.—Surety.—Practice.

In the Goods of
JOSEPH
LEESON.

Administration will be granted to the attorney of the next of kin, such attorney being resident without the jurisdiction of the Court, if the sureties to the bond are resident within the jurisdiction.

In this case the deceased, late a captain in the 42nd Regiment Bengal N. I., died in the East Indies in February, 1848, leaving his widow, who had since died intestate, without taking administration, and five children, him surviving. The deceased left no property in England except a reversionary interest in some trust-funds. The tenant for life died on the 31st of December, 1858. All the deceased's children were resident in India, and one of them, Mrs. Fanshawe, had duly appointed her aunt, Miss Maria Martha Leeson, residing at St. Servan, in France, her attorney, for the purpose of taking out letters of administration of the personal effects of the deceased for her use and benefit. Miss Leeson had been duly sworn to administer, etc., and had entered into the usual bond with two sureties, who were resident in England. A difficulty was felt in the registry with respect to the party applying as attorney being resident without the jurisdiction of the Court, in consequence of some similar case which had been before the late Judge of the Prerogative Court in chambers. In that case, the principal and the attorney were both resident in Gibraltar.

Dr. Middleton now moved the Court to direct the letters of administration to pass the seal. He cited *In the Goods of John O'Byrne*, 1 Hagg. 316.

SIR C. CRESSWELL: As in this case the next of kin reside in India, whilst the attorney is only on the other side the Channel, and has executed a bond with two sureties resident in England, the administration may be granted as prayed.

1859. In the Goods of ELEANOR LANCASTER (Spinster, deceased),
November 16. on Motion.

In the Goods of
JOSEPH
LEESON.

Probate.—General or Limited Grant.—Practice.

A clause revoking all former wills in a will purporting to deal only with certain trust-property, entitles the executor of the will to a general grant of probate.

In this case the deceased, Miss Lancaster, left a will in the following words :—“ This is the last will and testament of me, “ Eleanor Lancaster, spinster, whereby I revoke all other wills “ by me at any time made, and declare this to be my last will “ and testament ; I give and bequeath all personal estate and “ effects vested in me as trustee (being the only property of “ which I am possessed, or to which I am entitled), to my “ brother, Henry Lancaster, his executors, administrators, “ and assigns, subject nevertheless to the trusts and equities “ upon which I hold the same, and I appoint the said Henry “ Lancaster sole trustee and executor of this my will. In wit- “ ness whereof,” etc.

On applying to the registry, a doubt arose whether the probate should be general or limited in terms to the trust-property.

Dr. Swabey moved the Court to grant a general probate to the executor named in the will. The general revocatory clause at the commencement is equivalent to a disposition to the persons designed by the Statute of Distributions, and would entitle the executor to a general probate (*Brenchley v. Lynn*, 2 Rob. 468), and the subsequent particular description of the trust-property does not affect this. The appointment of executor is also in general terms.

SIR C. CRESSWELL: I think the executor is entitled to a general grant.

1859.

O'DWYER v. JOHN GEARE AND ANOTHER.

December 7.

In the Goods of MARY ANN PARKIN (Widow, deceased).

O'DWYER

Appointment by Married Woman under Power.—Nomination of Executors.—21 & 22 Vict. c. 95, s. 16.

v.
JOHN GEARE
AND ANOTHER.

Generally the nomination of executors in a testamentary paper purporting to dispose of real property only entitles the document to probate; but where a married woman, in execution of a power, devises real estate only and names executors "of this my will," she, if she survive her husband without altering, revoking, or republishing such will, is intestate as regards any property not specifically mentioned therein, and such executors take nothing *jure representationis*.

The next of kin is entitled to administration of the personal estate on oath that the deceased died intestate except as to real estate.

The deceased Mary Ann Parkin died in January, 1858, a widow without a child, having, during the lifetime of her husband George Parkin, by virtue of certain powers under an indenture of settlement, devised certain real property in St. John's, Newfoundland, to John Geare and John Ellis, upon certain trusts, and appointed them "executors in trust of this "my will;" and Mary Ann Georgina O'Dwyer, her grand-daughter, principal legatee for life. The testatrix survived her husband, and died without having revoked, altered, or republished her said will.

Geare and Ellis had been cited to appear and take probate, or to show cause why administration of the personal estate of the deceased (with the will annexed) should not be granted to Mary Ann Georgina O'Dwyer, the grand-daughter and one of the next of kin of the deceased, and also the principal legatee for life named in the will.

Dr. Wambey moved the Court accordingly.—The will purports to dispose of realty only, but where there is an appointment of executors the rule in the registry has been to grant probate on the ground that the appointment of executors saves an intestacy as regards any personal property which the deceased might possess. A difficulty is now felt in consequence of 21 & 22 Vict. c. 95, s. 16: "Whenever an executor "appointed in a will survives the testator, but dies without "having taken probate, and whenever an executor named in

Nov. 23,

1859. " a will is cited to take probate and does not appear to such
 Nov. 23 and " citation, the right of such person in respect of the executor-
 December 7. " ship shall wholly cease, and the representation to the tes-
 O'DWYER " tator and the administration of his effects shall and may,
 v. " without any further renunciation, go, devolve, and be
 JOHN GEARE " committed in like manner as if such person had not been
 AND ANOTHER. " appointed executor." But the intention of this was to clear
 a non-appearing or renunciant executor for ever out of the
 way, and there is nothing to affect the construction of the
 will as to testacy or intestacy arising from the original ap-
 pointment of executors. *Cur. ad. vult.*

December 7. SIR C. CRESSWELL: In this case I have considered the
 application made by Dr. Wambey, for administration with
 the will of Mary Ann Parkin annexed. It appeared to me at
 the time that the grant could not be made with the will an-
 nexed, for that the party died intestate, except as to certain
 real property devised in execution of a power. Dr. Wambey
 founded an argument on what he contended to be the true
 construction of the 21 & 22 Vict. c. 95, s. 16. I doubted
 whether at the time I clearly understood the drift of the argu-
 ment, and therefore thought it better to take time to consider
 it. I apprehend that what he meant was, that the original
 appointment of executors would operate to prevent an intes-
 tacy as to any part of the property of the deceased, and that
 when they renounced, it did not so operate as to cause an
 intestacy. I agree to that, but the question turns upon the
 effect of the appointment of executors, not upon their renun-
 ciation. The will professes to deal with nothing but some
 real property, by virtue of a power of appointment, which was
 devised to Geare and Ellis, and their heirs, etc., and upon
 trust, and afterwards they were appointed executors in trust
 of that her will. In *Tugman v. Hopkins*, 4 M. & G. 400,
 Lord C. J. Tindal, in a well-considered judgment, ruled, that
 executors so appointed took nothing *jure representationis*, and
 that as to property not disposed of under the power, the party
 died intestate. So here, the executors would take nothing
jure representationis. The will operated only on the property
 disposed of in execution of the power, and the grant now asked
 for must be without the will annexed. Miss O'Dwyer may
 swear that the testatrix made no will, except as to real estate.

CASES

IN THE

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

(*Before the Full Court,—CAMPBELL, C.J., MARTIN, B., and the
JUDGE ORDINARY.*)

1859.
May 20 & 25.

RATCLIFF v. RATCLIFF AND ANDERSON.

RATCLIFF
v.
RATCLIFF
AND
ANDERSON.

*Jurisdiction.—Evidence.—Arrangement between Husband and
Adulterer.—Costs.—Maintenance of Divorced Wife.*

Where the domicile of the parties is English the jurisdiction of the Court is founded, though the marriage and adultery may have taken place abroad.

The duplicate registers of marriage kept in the East Indies and transmitted to this country by the direction of the governing authority there, are admissible in evidence.

Arrangements entered into between the husband and the adulterer, not with a view to the continuance of the adulterous intercourse, but to send the wife home to live under her mother's protection, are no bar to the husband's petition.

Part of such arrangements being that, in any proceedings for a divorce the husband should bear his own costs, the Court condemned the co-respondent in the whole costs, on the ground that he had not carried out a part of the agreement on his side as to leaving the regiment in which both were officers.

On a question of permanent maintenance under section 32 of the Divorce Act, the Court will consider the ability of the husband as well as the conduct and income of the wife, not only as to the amount, but as to whether it shall make any order at all for maintenance.

This case was conducted by *Dr. Deane, Q.C.*, and *Dr. Spinks*, for the petitioner; by *Dr. Swabey* for the respondent; May 20.

1859. by *Dr. Phillimore*, Q.C., and *Mr. Addams*, for the co-re-
May 20 & 25. spondent.

RATCLIFF
v.
RATCLIFF
AND
ANDERSON.

No witnesses were called on behalf of the respondent, and the questions that arose depended—first, on a correspondence put in evidence, and arrangements entered into thereby, between the colonel and adjutant of the regiment, Captain Anderson on his own behalf, and Colonel Cotton acting for Captain Ratcliff. The marriage had taken place in India, at Poona, in November, 1844, and the transactions referred to took place in 1850, at Dugshai, in the East Indies, where the 22nd Regiment, to which both Captain Anderson and Captain Ratcliff were then attached, was quartered. The arrangement entered into was finally expressed in the two following letters:—

“Dugshai, 7th of August, 1850.

“Sir,

“I have the honour, in reply to your letter of this morning, and in explanation of mine of yesterday, to inform you that Captain Ratcliff promises that no expense shall be incurred by Captain Anderson in regard to the process of law through which it may be necessary to go in obtaining a divorce, and Captain Ratcliff agrees, should he seek for a divorce, that the whole expense of the law process shall fall upon himself; provided, of course, that Captain Anderson leaves the regiment, maintains Mrs. Ratcliff as already proposed by him, and pays her passage to England in the event of her going there.

“I have the honour, etc.

“SYDNEY COTTON.

“To Lieutenant-Colonel commanding 22nd Regiment.”

“9th of August, 1850.

“Sir,

“I have the honour to acknowledge your letter of the 8th inst. and copies of two letters from Lieutenant-colonel Cotton to Colonel Boileau, commanding. I have now to state, for the information of Colonel Boileau, commanding H.M. 22nd Regiment, that I will endeavour, as speedily as possible, to procure an exchange into another regiment; and I add, for the satisfaction of Captain Ratcliff, that I shall now do my

utmost to hasten the departure of Mrs. Ratcliff for England.

1859.

May 20 & 25.

"I have the honour, etc.

"D. ANDERSON.

"To the Adjutant H.M. 22nd Regiment.—Dugshai."

RATCLIFF
v.
RATCLIFF
AND
ANDERSON.

Captain Ratcliff pressed for a positive promise from Captain Anderson to quit the regiment, but the colonel commanding expressed himself satisfied with the undertaking as contained in the preceding letter, stating that he could, at a later period, exercise his authority in the matter if necessary. Mrs. Ratcliff was sent to England at Captain Anderson's expense, who also made her an allowance at the rate of £100 per annum. Mrs. Ratcliff was received by her mother, to whom Captain Ratcliff had written, expressing his wish that such should be the case.

In October of the same year Captain Anderson wrote to the adjutant to say that he had applied to ten regiments, but had been unable to meet with an even exchange, and that the expense he had incurred by paying Mrs. R.'s passage to England, and the further liability of her allowance, prevented his paying for an exchange; that to sell out would ruin his professional prospects, and calling upon the colonel commanding to release him from his undertaking to leave the regiment.

Colonel Boileau, upon this, wrote to General Sir Charles Napier, and, in consequence of a reply from him, Colonel Boileau informed Captain Anderson that he considered him released from his promise to exchange. Eventually Captain Ratcliff left the regiment, and became paymaster of a cavalry regiment till September, 1858, when he went on half-pay.

The question of the jurisdiction of the Court with respect to the locality of the marriage and the subsequent transactions was also mooted, and the admissibility of duplicate registers of marriage kept in that country and transmitted to the India-house by the authority of the East India Company was discussed.

Cur. adv. vult.

LORD CAMPBELL, C.J., gave judgment: A preliminary objection is made on the part of the co-respondent that this Court has no jurisdiction to entertain the suit, as the marriage, the alleged adultery, and all the material facts relied upon by

May 25.

1859.

May 25.

RATCLIFF

v.

RATCLIFF

AND

ANDERSON.

the petitioner took place in the East Indies. The Court for Divorce and Matrimonial Causes certainly has no jurisdiction beyond that which it derives from statute 20 & 21 Vict. c. 85, by which it was constituted. But in construing this statute, we can only look to its enactments as they appear in the statute-book, without regard to anything to be found in any other Bill upon the same subject introduced either into the House of Lords or the House of Commons, and not passed into a law, or to any proposal or opinion said to have been propounded by any member of either House while this Bill was passing through Parliament. The preamble having recited that it was "expedient to amend the law relating to "divorce, and to constitute a Court with exclusive jurisdiction "in England," section 27 enacts that "it shall be lawful for "any husband to present a petition to the said Court, praying "that his marriage may be dissolved on the ground that his "wife has, since the celebration thereof, been guilty of adultery." It is not necessary at present to define the extreme limits of the jurisdiction of the Court; but I am clearly of opinion that we have jurisdiction over this case upon which we are required to adjudicate. The parties are British subjects. At the time when the matters set forth in the petition arose, the parties were domiciled in England, and they were still domiciled in England when the suit began. Under such circumstances it cannot be necessary that the marriage should have been celebrated in England; nor would the Court have been ousted of its jurisdiction if the adultery had been alleged to have taken place in France or in Scotland. We were told of a decision in the House of Lords to the contrary, in *Sandwith v. Sandwith*; but, upon examination, this turns out only to have been an exercise of the legislative power of Parliament to pass a divorce Bill since 20 & 21 Vict. c. 85, constituting the Court for Divorce. That statute, of course, could not limit the legislative power of Parliament, nor can the construction of that statute be influenced by a marriage being thus legislatively dissolved.

The next objection made on the part of the respondent was, that the petitioner had not given sufficient evidence of the celebration of his marriage; and this depends upon the admissibility of the entry in the book produced before us from

the archives of the East India Company. The clerk who produced this book said: "It is the return of marriages celebrated in India, made under the authority of the East India Company;" from which I understood that the original register in India, and the authenticated copy transmitted to the secretary of the company in London, were made under the authority of the company. And it appears from Hubback on Successions, that under the authority of the East India Company there has been for many years a quarterly return to the Court of Directors in London from each of the presidencies, of Bengal, Madras, and Bombay, of marriages celebrated in the preceding quarter in each presidency. This professes to be an authenticated copy of a public register of marriages kept by authority in each presidency. Such a copy has been regularly transmitted to the secretary of the East India Company in London, and being bound in a book, is deposited in the secretary's office, and is kept among the archives of the East India Company. The petitioner's marriage in 1844 having been anterior to 14 & 15 Vict. c. 40, "An Act for Marriages in India," the proof of it is not affected by any of the enactments of this Act. But, irrespective of any enactment upon the subject by the British Parliament, I am of opinion that the entries in this book are admissible evidence to prove the celebration of marriage in India. The East India Company, under the sovereignty of the Crown, possessed supreme power over the possessions of the Company in the East Indies, and had authority to order a register of marriages to be kept in each presidency, and an authentic copy of this register to be made by the servants of the Company in India, and to be transmitted to the office of the secretary of the Company in London, and there kept among the archives of the Company for general information. Under such authority such a register has been kept, and such a copy has been transmitted. I am therefore of opinion that the book in question is admissible. Although called a copy, it is the original document made in obedience to the law of the country by the officers of the Government. The rule upon this subject seems to me to be well laid down and explained in Greenleaf on Evidence, part 3, ch. 4, sec. 483: "The next class of public writings to be considered, consists of official registers, or books kept by persons

1859.

May 25.

RATCLIFF
v.
RATCLIFF
AND
ANDERSON.

1859.
May 25.
RATCLIFF
v.
RATCLIFF
AND
ANDERSON.

“ in public offices, in which they are required, either by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties and under their personal observation. These documents, as well as all others of a public nature, are generally admissible in evidence, notwithstanding their authenticity is not confirmed by those usual and ordinary tests of truth, the obligation of an oath and the power of cross-examining the persons on whose authority the truth of the documents depends. The extraordinary degree of confidence which is reposed in such documents is founded principally upon the circumstance that they have been made by authorized and accredited agents appointed for the purpose, but partly also on the publicity of their subject-matter. Where the particular facts are inquired into and recorded for the benefit of the public, those who are empowered to act in making such investigations and memorials are, in fact, the agents of all the individuals who compose the state, and every member of the community may be supposed to be privy to the investigation. These books therefore are recognized by law, because they are required by law to be kept ; because the entries in them are of public interest and notoriety, and because they are made under the sanction of an oath of office, or at least under that of official duty.” The books kept among the archives of the East India Company, professing to contain authenticated copies of the register of marriages celebrated in India, may be considered as duplicate originals, and they seem clearly to come within the category of public documents above described. Accordingly they have been admitted in the House of Lords as evidence of the celebration of marriage in peerage cases and in divorce cases, in which the Lords profess to be guided by the rules of evidence observed in the Courts of common law ; and the clerk who produced the book in question to us stated that he had produced similar books in the Court of Common Pleas, and in other Courts, where they were admitted in evidence without objection. The petitioner’s marriage therefore appears to me to be proved.

The adultery is likewise clearly proved ; indeed it is not denied by Captain Anderson ; and Mrs. Ratcliff’s counsel on this part of the case only tried to raise an unfounded doubt

as to the identity between her and the Mrs. Ratcliff who eloped with Captain Anderson from Dugshai and lived with him as his mistress at Kussowlie. We have therefore to consider whether anything appears to prevent the petitioner from obtaining the remedy to which he makes out a *prima facie* claim. Cruelty is alleged as a bar, but of this there is no evidence; and, whether the petitioner may or may not always have acted as a prudent and affectionate husband, there is no ground for imputing to him that he had consciously done anything which could have contributed to his dishonour. The plea of condonation entirely fails, as the doctrine on this subject is now settled; for whatever Christian forgiveness the petitioner may have been ready to extend to his wife after her fall, it is clear that he never intended, nor gave her or any one else reason to believe that he intended, to live with her again as his wife.

It is urged, however, that without condonation the divorce ought to be withheld on account of the arrangement between the parties, by which Captain Anderson was to be at the expense of sending Mrs. Ratcliff to England, and was to allow her £100 per annum, which he has continued to pay regularly down to the present time. Had this arrangement been made with a view to a continuation of the adulterous intercourse between Captain Anderson and Mrs. Ratcliff, I should have considered it a bar to the divorce; but the object in view was, that she should return to England as speedily as possible, and live there respectably with her mother, which she did accordingly. The petitioner appears from poverty to have been unable to bear this expense, and without the provision made for her under the arrangement she might have become an outcast on society. The remaining objection is unreasonable delay; but this likewise is answered by the petitioner's pecuniary circumstances, for upon Captain Anderson refusing to perform his promise to exchange from the 22nd regiment, the petitioner was obliged to leave it, and was not in a position to bear the expense of bringing an action for criminal conversation, of instituting a suit in the Ecclesiastical Court for a divorce *à mensd et thoro*, and to carry a Bill through Parliament for a dissolution of the marriage. If there had been no agreement between the parties, or if Captain Anderson had fully per-

1859.

May 25.

RATCLIFF

v.

RATCLIFF

AND

ANDERSON.

1859.

May 25.

RATCLIFF
v.
RATCLIFF
AND
ANDERSON.

formed the agreement on his part, I should have been inclined to think that costs ought not to be awarded against him ; for there seems no reason to suppose that he acted the part of a seducer, and if he really had left the regiment in fulfilment of his promise, he would have done all that a man of honour could do in his unfortunate situation to repair the unpremeditated error into which he had fallen ; but after an anxious consideration of the correspondence given in evidence before us, I am of opinion that the breach of his promise to leave the regiment was wholly indefeasible. It is quite clear that he had given the promise, and that neither Colonel Boileau nor General Napier had any power to release him from it. Captain Ratcliff and Captain Anderson, after what had happened, could not possibly sit down together at the same mess, and Captain Anderson's withdrawal was the basis of the agreement between them. Captain Ratcliff always reserved to himself the power of suing for a divorce. Being allowed to remain in the twenty-second regiment, he was to take the necessary proceedings for it at his own expense ; but being obliged to leave the regiment, he appears to have been ruined in his profession, and afterwards going on half-pay, to have been disabled from bearing the expense. Therefore no ground remains for the immunity claimed, and I am of opinion that the Court is bound to pronounce for the divorce, all costs to be paid by the co-respondent.

Dr. Swabey applied to the Court for some order for maintenance for the respondent under 32nd section of the Divorce Act. The allowance paid by Captain Anderson was entirely precarious ; Mrs. Ratcliff had led a retired and proper life since she came to England in December, 1850, and though Captain Ratcliff's half-pay was small, he would probably be in active service again, and the order might direct him to pay the respondent a certain proportion of his income, in no case to exceed a moderate sum, to be fixed by the order.

But the COURT, admitting that Mrs. Ratcliff's conduct since 1850 had been, under the circumstances, such as not to disentitle her to a maintenance, yet, adverting to the very limited income of Captain Ratcliff, and all the circumstances of the case, refused to make any order.

(Before the Full Court,—LORD CAMPBELL, C.J., POLLOCK, C.B.,
and the JUDGE ORDINARY.)

1859.

June 16.

CUNNINGTON v. CUNNINGTON AND NOBLE.

CUNNINGTON

v.

CUNNINGTON
AND NOBLE.

*Petition for Dissolution by Husband.—Neglect or Misconduct
conducting to the Adultery.*—20 & 21 Vict. c. 85, s. 31.

A., being a clerk in the Post-office, married in September, 1849; in November, 1850, he was apprehended and convicted of feloniously opening a letter, etc., and imprisoned. The wife was maintained by her relations, but an affectionate correspondence subsisted between herself and A. In 1853 she, however, formed a connection with the co-respondent, and a child was born in March, 1854, of which she did not inform her husband till March, 1855. He was soon after liberated, and upon the passing of the Divorce Act brought the present suit for dissolution of the marriage:

HELD (*dubitante* POLLOCK, C.B.) that, although the adultery would in all probability never have taken place but for the absence of the husband, it was not, under 20 & 21 Vict. c. 85, s. 31, such wilful neglect or misconduct as had conduced to the adultery so as to raise a case for the discretion of the Court; that such neglect or misconduct, to come within the meaning of the section, must be neglect of or misconduct towards the other spouse on the part of the petitioner.

This petition was argued in the sittings of the full Court in May, 1859. A question arose as to whether the circumstances raised a case for the discretion of the Court under sect. 31 of the Divorce Act, which provides, that though the petitioner's case may have been proved, the Court shall not be bound to pronounce its decree, "if it shall find that the petitioner has "during the marriage been guilty of adultery, or if the petitioner shall in the opinion of the Court have been guilty of "unreasonable delay in presenting or prosecuting such petition, "or of cruelty towards the other party to the marriage, or of "having deserted or wilfully separated himself or herself from "the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct "as has conduced to the adultery."

Mr. J. H. Hodgson appeared for the Petitioner.

May 24.

The facts are sufficiently stated in the judgment of Lord Campbell, C. J.

Cur. adv. vult.

1859.

June 16.

CUNNINGTON
v.
CUNNINGTON
AND NOBLE.

On a subsequent day (June 16) the following judgments were delivered by Lord Campbell, C.J., and the Judge Ordinary. Pollock, C. B. gave his reasons for dissenting from the view taken by the majority of the Court.

CAMPBELL, LORD, C.J. : I am of opinion that in this case the Court ought to pronounce for the divorce. The only doubt raised is, whether the petitioner had or had not been guilty of such wilful neglect or misconduct as had conduced to the adultery. At the time of his marriage, in September, 1849, he was a clerk in the General Post-office at a salary of £80 a year ; his wife and he were much attached to each other, and lived very happily together till November in the following year, when he was apprehended on a charge of having feloniously opened a letter in the Post-office and taken a shilling from it. Upon this charge he was tried at the Central Criminal Court, and, being found guilty, was sentenced to ten years' transportation ; his wife, who was a woman of good education and very respectable connections, still continued much attached to him, and strove to obtain a pardon for him or a mitigation of his sentence. After being confined in several prisons he was sent to the convict establishment at Dartmoor. He had no means of making any pecuniary provision for his wife ; but during more than two years he kept up a constant and affectionate correspondence with her by letter, and they expressed a hope of again living happily together when he should be liberated. Her family supplied her with the means of decent subsistence, and she led a very reputable life till the summer of the year 1853 ; she then boarded and lodged under the name of Mrs. Ashton with a respectable lady at Roydon, in Essex. In the same house lodged and boarded Richard Noble, the co-respondent, who was bailiff to a gentleman of a large estate in the neighbourhood. A criminal intimacy then arose between Mrs. Cunningham and Richard Noble ; in March, 1854, she was delivered of a child, of which he was the father, and she has since lived with him in concubinage. Although she continued to write to her husband, she concealed this illicit intercourse from him till March, 1855, when she wrote a letter to him confessing it, and entreating him to go to Australia and not to annoy her. He was much distressed on receiving

this letter ; being soon after discharged from prison, he entered into business as a commission agent in London, and on the passing of 20 & 21 Vict. c. 85, he commenced this suit.

The adultery probably never would have happened if he had not been guilty of the misconduct for which he was prosecuted ; but I do not think that this misconduct “conducted to “the adultery” within the meaning of the 31st section of the Act—although a *sine quâ non*, it was neither directly nor indirectly a *causa causans*.

According to the received meaning of the word “conduce,” I think that what has conducted to an effect must in some sense have caused it or contributed to it, and the conducting cause must be such as, if not directly, at least indirectly, might at the time of the misconduct be contemplated by the husband as likely somehow to contribute to his dishonour ; but when the petitioner in this case stole the shilling he was still a loving and attentive husband, and so he continued for several years after, until he heard with anguish that his wife had been unfaithful to him. Suppose that an officer in the army is sentenced to imprisonment for sending a challenge or for fighting a duel, and that, while he is imprisoned for the misdemeanour or the felony, his wife, being thus separated from him, falls a victim to seduction, shall it be said that the injured husband has disentitled himself to all remedy because his misconduct in sending the challenge or fighting the duel conducted to the adultery ? Yet it may be truly said, that without this misconduct the adultery never would have taken place. The neglect or misconduct specified in the 31st section following—“Cruelty, desertion, and wilful separation without “reasonable excuse”—must, I think, be neglect or misconduct by the husband *ejusdem generis*, viz. in his marital capacity, and must be a breach of some marital duty. Although there be a change of expression between the 29th and 31st sections, I do not think that a man can be guilty of “neglect “or misconduct,” within the meaning of the latter, unless he has been “in some manner accessory to the adultery,” within the meaning of the former. The laudable policy of the Legislature seems to have been to deprive the husband of a remedy by divorce, if he has misconducted himself as a husband, and has contributed to his own dishonour ; but I discover no in-

1859.

June 16.

CUNNINGTON
v.
CUNNINGTON
AND NOBLE.

1859.

June 16.

CUNNINGTON
v.
CUNNINGTON
AND NOBLE.

tention in the statute to punish neglect or misconduct, unconnected with the relation of husband and wife, by the new punishment of rendering indissoluble a marriage which has become a disgrace and a curse; nor can it easily be supposed that it was the object of the Legislature to confer impunity upon a married woman where the seducer has availed himself of the absence of a husband who has anxiously performed all his marital duties, but who may have committed some offence for which he has been for a season justly deprived of his liberty.

I feel most sensibly the importance of the duty imposed upon this Court of guarding against laxity in granting divorces; but if we were to refuse the divorce prayed for in the present case, I think we should be contravening the intentions of the Legislature, and doing injustice to a man whose conduct as a husband has ever been irreproachable.

POLLOCK, C.B.—When the case stood over, I was not prepared to pronounce, without hesitation, either for or against the divorce, and even at this moment I do not carry my acquiescence in the judgment of the Court beyond the point of not dissenting from it. I think it right to state openly the grounds on which I doubted at that time, and to say that my doubts, if they do not induce me to dissent from the conclusion of the Court, are not altogether removed. The marriage and the adultery of the wife are fully established, and, if that were all to be inquired into, the petitioner would appear to be entitled to the remedy prayed. There is no evidence of any of those matters, the absence of which is made, as it were, a condition precedent to the right of having a divorce. There is no evidence that the petitioner has been accessory to or conniving at the adultery, nor that he has condoned it. There is, indeed, abundant evidence to the contrary. Nor is there any evidence that the petition was presented by collusion with either of the respondents. Although in all probability the respondents were more anxious for a divorce than the petitioner himself, there is no evidence to justify the Court in treating the case as one of collusion. The petitioner, therefore, has an apparent title to a decree of divorce, and the only ground on which it can be denied is,

that the Court is not bound to pronounce a decree, for some of the reasons stated in the proviso to the 31st section of the 20 & 21 Vict. c. 85. The only reasons therein contained to which it is now necessary to allude, are the *desertion* of the wife by the husband, and his *wilful neglect or misconduct*. The present *status* of the petitioner is that of a convicted felon, who has been sentenced to transportation for a period which has not yet expired. He is at large by virtue of a ticket-of-leave, given him by the Secretary of State for the Home Department, and it may reasonably be doubted whether those who framed the law we have to administer ever contemplated a petition for a divorce by a person in such a social position. But the only material question is, whether the petitioner had been guilty of misconduct which conduced to the adultery or had deserted his wife. There is no doubt that within a year of the marriage he committed a felony for which he was sentenced to ten years' transportation, not yet expired. In point of fact he has never been actually sent out of the kingdom, but was detained in various prisons for several years. During this time he did not support his wife,—he had indeed no means of doing so,—and he did not give her any of the social benefits of marriage, especially that of protection and guardianship, which might have prevented her from going astray. The crime of the husband, in my opinion, in point of fact, led to the vice of the wife. She was apparently a well-educated, affectionate, well-disposed woman, and if any one asked the cause of her fall, the answer of every one acquainted with the circumstances, and speaking the English language, would be, in my opinion, that it was owing to the crime and the punishment of the husband, which has not merely conduced to it, but has been one of the circumstances without which it would not,—perhaps could not have happened. It is, however, said that the statute must be construed according to the rules applied to the construction of all other statutes, and the misconduct alleged as conducing to the adultery must be some act tending directly, not remotely, to produce such a result. There is great weight in that observation. I own I am inclined to believe that if this sort of case had been distinctly presented to the Legislature, they would not have given the husband a right to a divorce; and I feel very confident

1859.

June 16.

CUNNINGTON
v.
CUNNINGTON
AND NOBLE.

1859.

June 16.

CUNNINGTON
v.
CUNNINGTON
AND NOBLE.

that under the old system, if it deserved the name of a system, the House of Lords would not have passed a bill for his relief. But neither of these considerations ought to prevail in the decision of this case; and although the statute contains much that is anomalous and new to the judicial mind, and from the peculiar nature of the subject might lead to special considerations, I am not prepared to adopt any other course in construing the statute than that which belongs to other statutes, and I cannot carry my doubt, as to what was really meant, so far as to differ from the opinion of the rest of the Court. The other question, Whether the petitioner had deserted his wife? if it is to be decided in the negative, is one to which the attention of the Legislature ought to be called. The protection given by the 21st section to a wife deserted by her husband was considered, during the progress of the measure through Parliament, to be one of its most salutary provisions. The object was to protect a wife maintaining herself by her industry or her property against the legal rights of the husband who has deserted her. If that section does not apply to the wife of a felon transported or sentenced to penal servitude, then a large class of women obviously within the scope and object of the section are without the remedy and protection which I find it impossible, in my own mind, to doubt the Legislature meant to give them. In construing the Act with reference to that point, it may be remarked that in the 31st section the word "wilfully" is put before the words "separated himself or herself from the other party," etc., but not before "deserted;" from which it may be inferred that "wilfully" is not put before "deserted," because desertion could not but be wilful, and therefore it would be surplusage. If the wife of a convict sentenced to a long period of transportation is not deserted and entitled to relief and protection, the husband may, by a power of attorney, claim her earnings, and he or his creditors may seize her property, and there is a *casus omissus* scarcely to be credited with reference to a statute, which attracted so much attention and underwent so much discussion as did the Divorce Act. My doubt as to the true construction of the statute on that point is not wholly removed, but it must be admitted that, according to the ordinary meaning of language, a man who is transported for a

crime does not desert his wife, but is forced away from her against his will, and although I have no doubt as to the general intention of the Legislature, that intention cannot be carried into effect beyond the plain meaning of language to be found in the statute. For these reasons I do not dissent from the judgment of the rest of the Court; but I think it right to express my doubts, and to call public attention to the state of the law, in order that if there is any mistake or error, it may be corrected.

1859.

June 16.

CUNNINGTON
v.
CUNNINGTON
AND OTHERS.

THE JUDGE ORDINARY: I agree with Lord Campbell as to the meaning of the last branch of the 31st section of 20 & 21 Vict. c. 85.

Several instances are specified in which the Court shall not be bound to pronounce a decree dissolving a marriage, although the case of the petitioner has been proved and the Court does not find that the petitioner has been accessory to the adultery or guilty of connivance, or has condoned it, or that the petition has been presented or prosecuted in collusion with the respondent. All those instances relate to a violation of marital duty on the part of the petitioner, adultery, unreasonable delay in presenting the petition, cruelty, desertion, or wilful separation without reasonable excuse. Then follow the general words, "such wilful neglect or misconduct as has conduced "to the adultery."

According to the ordinary rule of construction general words following particular are taken to be applicable to things *ejusdem generis*, and if so, the "wilful neglect or misconduct" intended must be taken to be neglect of the other party or misconduct towards the other party. If neglect is construed in its larger sense, so as to include any neglect that has conduced to the adultery, it would apply to neglect of business, which causes poverty, or neglect of official duty, which causes dismissal and loss of station, and so causes poverty, in consequence of which the wife falls into temptation; but it seems to me that the Legislature could not have intended to include such neglect; if the neglect intended was neglect of the wife, it seems to follow that the misconduct intended must be misconduct towards the wife. A man may be guilty of misconduct in society (wholly apart from any treatment of his wife), which would

1859.

June 16.

CUNNINGTON
v.
CUNNINGTON
AND OTHERS.

cause her to feel contempt for him, and so render her liable to compare him unfavourably with another, and that may conduce to adultery.

In a case like the present, suppose the husband's guilt in stealing the letter having become known to the wife, she, in order to save him from the penal consequences of the act, prevailed upon him to absent himself for two or three years, and during that time yielded to temptation; his misconduct would be precisely the same as that which we are now considering, and it would conduce to the adultery in the same manner, viz. by causing his absence. His absence in this case is not the misconduct relied on, for it was involuntary. The theft was the misconduct; and if the theft in this case is to be deemed within the meaning of the statute, it must also in the case which I have put. I cannot suppose that any such thing was intended; in reality it was not the misconduct of the husband, but the consequence of that misconduct which conduced to the adultery.

For these reasons I think that we have not an option as to pronouncing a decree for dissolution of the marriage between these parties.

June 1 & 15.

(Before the JUDGE ORDINARY.)

SELLER.

v.

SELLER.

SELLER v. SELLER (on demurrer).

*Judicial Separation.—Adultery of Petitioner Condoned
no bar.*

A wife petitioned for judicial separation by reason of her husband's adultery, setting forth in the petition a sentence of divorce *à mensâ et thoro* obtained by the husband in 1833 by reason of her adultery, after which the parties were reconciled and cohabited together. On demurrer to this petition:

Held, that the adultery of the petitioner having been condoned was no bar to her present suit.

This was a petition for judicial separation at the suit of the wife by reason of the husband's adultery. The petition stated the marriage in 1826; that the parties cohabited till 1831, when the husband was alleged to have deserted the wife; that

in 1833 the husband obtained a sentence of divorce *à mensâ et thoro* in the diocesan Court of Chester, by reason of the alleged adultery of the wife; that in 1850, at the request of the husband, the parties became reconciled and returned to cohabitation, which lasted about three months, when the husband again deserted the wife; that since that time the husband had cohabited with one Harriet Day, with whom he had bigamously intermarried in 1834. This petition was demurred to, on the ground that it appeared on the face of it that the petitioner had herself been guilty of adultery, and that the husband had obtained a sentence of divorce *à mensâ et thoro* in a competent Court on proof thereof.

1859.

June 1 & 15.

SELLER
v.
SELLER.

Dr. Spinks argued in support of the demurrer: It will be contended on the other side, that by the condonation the wife was restored to her former condition; but that, according to Lord Stowell's view of the matter in *Beeby v. Beeby*, would not make her *recta in curiâ*, and entitle her put in force the process of the Court.

Dr. Phillimore, Q.C., *contrâ*, relied on the case of *Anichini v. Anichini*, as, in substance, deciding the point which, though raised by Lord Stowell in *Beeby v. Beeby*, he did not then feel himself called upon to decide.

Cur. adv. vult.

THE JUDGE ORDINARY: The only question argued in this case was, whether a wife, having been guilty of adultery, and having been condoned by her husband, could maintain a suit for judicial separation on the ground of adultery subsequently committed by him. It was treated on both sides as a new question that had never received a judicial decision. The authorities relied on were a dictum of Lord Stowell's in *Beeby v. Beeby*, 1 Hagg. 789, and the decision of the Court in *Hope v. Hope*, 1 Swab. & Tris. 94, on the one side; and the opinion expressed by Dr. Lushington in *Anichini v. Anichini*, 2 Curt. 210, on the other. In *Beeby v. Beeby* Lord Stowell certainly intimated an opinion that a husband or wife having been guilty of adultery would not by condonation be so released from imputation as to be enabled to maintain a suit for adultery committed by the other party; but the point was not decided.

June 15.

1859.
June 16.
—
SELLER
v.
SELLER.

In *Hope v. Hope* a distinction was taken between the effect of condonation and of mutual guilt or *compensatio criminum*; neither did that case, therefore, decide the question now raised. But it seems to me that in *Anichini v. Anichini* the identical question was raised and decided. The wife sued for restitution of conjugal rights; the husband pleaded her adultery, and prayed a divorce; the wife recriminated; the husband replied condonation of his guilt; and the learned Judge decided that the adultery of the husband having been condoned was no bar to his prayer for divorce on account of the adultery of the wife, which was accordingly decreed. That is a direct authority for saying that the adultery of one party having been condoned is not a bar to a suit for divorce on account of the adultery afterwards committed by the other. I am unable to find any distinction between the two cases, and even if I differed in opinion with the learned Judge (which I do not) I should consider myself bound by his decision. I must therefore overrule the demurrer. The respondent may answer the petition.

April 27 &
May 26.
—
WARD
v.
WARD.

WARD v. WARD.

Judicial Separation.—Practice.—Alimony pendente lite.—Husband without Means.—Taxation of Wife's Costs ordered.—Attachment for Non-payment of Alimony refused.—Leave for a fieri facias to issue granted.

The Court will make an order for the taxation and payment of the wife's costs in a matrimonial suit against the husband, notwithstanding his apparent inability to pay them.

SEMPLE, it will not grant an attachment for disobedience to such order, if satisfied of the husband's inability, through poverty, to comply with it.

The Court refused to allow an attachment to issue against a common workman, dependent upon his weekly earnings of 24s. a week, and whose sole property consisted of furniture of the value of £4, for non-payment of £2. 4s. arrears of alimony *pendente lite*, but gave the wife leave to sue out a *fi. fa.* for the sum due.

This was a suit for judicial separation brought by the wife

against the husband on the ground of cruelty. The present application was for an allotment of alimony *pendente lite*, and for an order that the wife's costs in the suit should be taxed against and paid by the husband.

On the question of costs affidavits had been filed by both parties.

It appeared by the husband's answer to the petition for alimony *pendente lite*, and from the affidavits filed on the question of costs, that he was a bricklayer and plasterer, and that when in work his wages averaged 24s. a week, but that he was sometimes out of employment, and that his only property consisted of some household furniture of the value of £4. It further appeared that the wife, out of a sum of money entrusted by the husband to her custody shortly before the commencement of this suit, had given £16 to her solicitor towards the expenses of the suit.

Dr. Spinks appeared for the petitioner in support of the application.

Dr. Tristram, for the respondent: On the question of costs, he submitted that the Court should, under the circumstances of the case, make no order. In the Ecclesiastical Courts, when it was shown that a husband was unable to pay his wife's costs, they were not taxed against him. In *Walker v. Walker*, 1 Curt. 560, Dr. Lushington, under similar circumstances, refused to order the wife's costs to be taxed against the husband, and said, "It is unquestionably the general practice that the husband must pay the costs incurred by the wife, but that rule is liable to some modifications; where, for instance, the wife has a separate income. In the present case the wife is not shown to be possessed of any property, and the husband, it appears, during the proceedings, has been discharged from prison by an order of the Insolvent Court, by which whatever property he possessed became vested in the assignee of that Court. . . . I apprehend that, if I proceed to the length of taxing this bill, I must direct a monition for the payment of it, and proceed, if the costs are not paid, to pronounce Mr. Walker in contempt, and to decree a *significavit* to issue; the result of which would

1859.
April 27 &
May 26.

WARD
v.
WARD.

1859.
April 27 &
May 26.

WARD
v.
WARD.

“be, that he would be committed to prison, and could not be released unless he paid these costs, or again obtain his discharge under the Insolvent Debtors Act.” Here the husband has no means wherewith to pay the costs; and if the order were made, could only free himself by going through the Insolvent Court. The wife’s solicitor has already received £16 of the husband’s money for the expenses of the suit. See *Wilson v. Wilson*, 2 Consist. 204.

Dr. Spinks, in reply : If the order for costs is to be withheld on the ground of the small means of the husband, the wives of working men will be precluded from suing in this Court.

THE JUDGE ORDINARY : I feel great difficulty in applying rules, which arose under a different system, to cases where the husband and wife have scarcely a penny between them.

Dr. Spinks : There is a distinction between *Walker v. Walker* and this case. There the husband had been just discharged under the Insolvent Debtors Act, which is not Mr. Ward’s case.

THE JUDGE ORDINARY : I allot alimony at 4s. per week. As *Walker v. Walker* is the only reported case that has been cited in which the Court has refused to order the taxation of the wife’s costs, I think I should be hardly justified in deviating from the ordinary practice of making the order for the husband to pay the wife’s costs. The £16, however, which her solicitor has already received must be deducted. If hereafter it should be satisfactorily shown that the husband is unable to pay the costs, I should be indisposed to grant an attachment for disobedience of the order. Let the costs be taxed up to the present time, and let the Registrar fix a sum to be deposited to meet the costs of the hearing.

May 26.

Dr. Spinks moved for an attachment against the husband for the non-payment of £2. 4s., arrears of alimony *pendente lite*.

THE JUDGE ORDINARY : What are the circumstances of the

husband? He has no property, and he is a labourer earning 24s. a week. The case against him is not that he will not, but that he cannot pay. I am in this difficulty, that if I were to order an attachment to issue against him, he would be shut up in prison, and I should thereby deprive him of the only chance of paying, and the wife of her only chance of obtaining alimony. I am most reluctant to do this, and shall therefore decline to grant an attachment. But I have no objection to give you leave to sue out a writ of *fieri facias*, which will enable you to take any property he may have.

Attachment refused; fi. fa. granted.

1859.

April 27 &
May 25.

WARD
v.
WARD.

ROWLEY v. ROWLEY.

July 20.

Petition for Dissolution of Marriage.—Amendment of Petition by the addition of a fresh Charge.—Affidavit.

ROWLEY
v.
ROWLEY.

A wife petitioned for a dissolution of her marriage on the ground of her husband's adultery, coupled with desertion. The husband filed no answer. She applied for leave to amend her petition, by adding a charge of cruelty, alleged to have been committed and to have been known to her before she filed her petition. The Court required her to bring in an affidavit of the acts of cruelty upon which she relied, and of the motives which had induced her to suppress them in her petition.

HELD, that the wife might amend her petition by adding a new ground for the dissolution of her marriage, the Court being satisfied that this new charge was not brought forward vexatiously.

On the 17th of July, 1858, Mrs. Rowley filed a petition for a dissolution of her marriage on the ground of her husband's adultery coupled with desertion without reasonable excuse, for two years and upwards. The petition stated that on the 10th day of February, 1852, Theresa C. Rowley was married to her husband, H. Rowley; that on the 24th of May, 1856, Mr. Rowley deserted his wife without reasonable cause, and did not return to her, having formed an adulterous connection with C. Green. The respondent had not put in an answer.

Mr. Macqueen moved the Court that the petitioner might

June 8.

1859. be at liberty to amend her petition by the addition of charges
July 20. of cruelty.

ROWLEY
v.
ROWLEY.

Dr. Wambey, contra: The motion was unusual. The facts sought to be adduced were not *noviter perventa*, and would not have been admitted to proof at this period of the suit by the practice of the Ecclesiastical Courts.

SIR C. CRESSWELL: Before granting this application, I shall require an affidavit as to the nature of the acts sought to be charged. The petitioner ought to have known her own case; still I shall not receive the objection from a party who has not come in to answer at all.

July 20. *Mr. Macqueen* renewed his former application, upon an affidavit giving minute details of various acts of cruelty alleged to have been committed upon her by the respondent, and which she had, from motives of delicacy, up to that time suppressed.

Dr. Wambey, contra: The affidavit of Mrs. Rowley does not disclose sufficient grounds to entitle her to amend the petition. The acts charged not being *noviter perventa*, she would not have been allowed to introduce them in additional articles by the practice of the Ecclesiastical Courts. The husband is not cited to appear to the charge of cruelty, but only for adultery and desertion.

THE JUDGE ORDINARY: I think that this application must be granted. When it was made before, I was not furnished with an affidavit of the circumstances which had led to the omission of this new charge, or of any particulars of the charge now sought to be made.

The principle upon which amendments are allowed at common law, is that justice may be done between the parties. The Common Law Procedure Acts allow amendments to be made even at the trial, for the purpose of determining the real question in controversy. But these statutes are not applicable to the present case, for cruelty has up to this time formed no part of the case. By the old practice at common law, it was

not unusual for a party to ask leave to add a fresh count to his declaration, even though it included a new cause of action, and his request would be granted upon such terms as would prevent the other party from being placed in a worse position than he was in before. Thus time to answer the fresh count would be always allowed.

In the present case, the petitioner seeks to add to her petition a new ground for the dissolution of her marriage; she asks for leave to proceed no longer on the original charges of adultery and desertion, but upon adultery and cruelty. If the respondent had pleaded in answer to the original charges, care would of course have been taken to ascertain whether the petitioner's proceeding was *bond fide*, and not for the purpose of harassing him, and the Court would have placed the respondent in as good a position as he was in before.

But here there is nothing of this kind. The only question is, whether the Court is satisfied that the new charge is not brought forward for vexatious purposes? It was to ascertain this that I required an affidavit from the petitioner. I think she has assigned reasonable grounds for her delay in charging cruelty; and though I cannot decide upon the facts, it would be unjust to refuse her application. The cause will not be begun *de novo*, but the respondent will be served with a copy of the amended petition. Perhaps, when the costs of the suit are taxed against him, the Court may be of opinion in dealing with them that he ought not to be put to any further expense on account of what has occurred; but I reserve the consideration of these costs. *Motion granted.*

1859.

July 20.

ROWLEY

v.

ROWLEY.

SUGGATE v. SUGGATE.

Jan. 24.

Practice.—Pleading.—Insufficient Averment of Cruelty.—Cruelty to Children in presence of Wife.—Permanent Custody of Children.—Evidence.

SUGGATE

v.

SUGGATE.

In a petition asking for relief on the ground of cruelty, acts sufficient to establish legal cruelty should be alleged; all pleadings should be

1859. as short as is consistent with alleging a legal ground for the prayer.
 Jan. 24. The respondent may apply for further specification if necessary.
 ———
 SUGGATE Acts of cruelty towards children in the presence of the mother may
 v. be alleged as cruelty towards her; but the Court will not receive
 SUGGATE evidence as to misconduct to children generally for the purposes of a
 future application for their permanent custody in a suit for separation,
 etc.; for, until it is in a position to decree the separation, it has
 no jurisdiction as to permanent custody of children.
 If necessary, the misconduct towards children may be proved after
 the main petition has been heard.

These were questions arising on a petition for judicial separation at the suit of the wife, by reason of cruelty, which also concluded with a prayer for an order for the custody of the children. The third and fourth paragraphs of the petition, as originally filed, were as follows:—

Thirdly, that, on the 26th day of July, 1848, and other days between that day and the 24th day of July, 1858, the said Alfred Suggate, at Lowestoft, in the county of Suffolk, was guilty of cruelty to your petitioner.

Fourthly, that, in the months of April and July, 1858, the said Alfred Suggate was on divers occasions guilty of cruelty to your petitioner's children.

Dr. Spinks, for the respondent, moved the Court to direct some specification of the cruelty towards the petitioner alleged in the third paragraph, and to strike out the fourth paragraph, on the ground that acts of cruelty to the children were not necessarily cruelty to the wife.

Mr. Macqueen, for the petitioner, had no objection to specify the acts of cruelty alleged in the third paragraph, but defended the fourth paragraph, as affording a ground for the prayer for the custody of the children.

THE JUDGE ORDINARY: There certainly should be some further specification as regards the third paragraph. A petition on the ground of cruelty ought to state certain acts which, if proved, would show legal cruelty to have been committed. There can be no doubt about the meaning of adultery, when stated as the ground of a petition; but cruelty in ordinary language is an ambiguous term. Precision as to details is to

be avoided. All pleadings should be as concise as is consistent with showing a legal ground for the proceeding instituted, and the other party may apply for further specification, if it be necessary for conducting the defence. With respect to the question of custody of children, and whether the prayer for that should form part of the petition for separation, or, where ill-treatment of them is alleged, be a separate proceeding, I must take time to consider.

Cur. adv. vult.

1859.

Jan. 24.

—
SUGGATE
v.
SUGGATE.

THE JUDGE ORDINARY: It must be borne in mind that the only power this Court has to make a permanent decree as regards custody of children is upon a decree for judicial separation, etc.: (sect. 35 Divorce Act.) Unless it is in a position to make such a decree, it has no jurisdiction whatever as regards the children, and it seems to me that great inconvenience might arise from going into the question of the respondent's conduct towards the children before a decision is come to as regards his conduct towards the petitioner; for, if she is not entitled to a decree, nothing can be done about the children. If issues are raised for a jury they might find a verdict negating the allegation of cruelty to the wife, and affirming misconduct towards the children; but it would be useless. But at the same time, as cruelty to the children in the presence of the mother has been held to be cruelty towards her, the petitioner is at liberty to allege cruelty to her children under such circumstances, and the fourth article may stand if it can be reformed by alleging that acts of cruelty towards the children were committed in the presence of the mother; but I should refuse, at the hearing of the petition, to go into evidence as to general misconduct towards the children.

In most cases, what is proved as to the misconduct of the husband towards the wife would be sufficient to enable the Court to decide upon any prayer for the custody of children; but, if it were not, I should allow the petitioner to produce further proof on affidavit as to particular misconduct towards the children.

1859.

July 25.

SUGGATE
v.

SUGGATE.

SUGGATE v. SUGGATE.

Judicial Separation.—Cruelty.—Condonation not pleaded but appearing in evidence.—Custody of Children.

When, on an issue before a jury of cruelty or not cruelty, condonation, by cohabitation continued after the last act of cruelty laid, appears on the evidence, the Court would probably refuse to pronounce a decree on a verdict finding cruelty. But if, under such circumstances, it would notice condonation, though not pleaded, it would also admit evidence of acts of cruelty subsequent to the condonation, though not pleaded.

SEMPLE, regard being had to the maintenance of the children, the wife, when she succeeds in her suit, has a *prima facie* right to the custody of the children under fourteen years of age; for she is not to buy the relief to which she is entitled owing to her husband's misconduct at the price of being deprived of the society of the children.

This was a petition for judicial separation, at the suit of the wife, by reason of the husband's cruelty. Mr. Suggate was a seller and teacher of music at Lowestoft. The petition stated the marriage of the parties in 1848; cohabitation principally at Lowestoft, and the birth of four children, three boys and a girl. It then set forth certain specific acts of cruelty, which, however, did not extend down to July, 1858, at which time, as it appeared in evidence at the trial, the parties were living together, and when, in consequence of a squabble and dispute about a bank-book and deposit-notes, and some copies of letters in Mr. Suggate's handwriting addressed to a female, Mrs. Suggate ultimately left her husband's house. The petition also set forth certain acts of violence towards the children in the presence of the mother (see p. 490), and concluded with a prayer for the custody of the children, as well as for a judicial separation. The answer of Mr. Suggate simply denied the cruelty alleged, and that issue was tried before the JUDGE ORDINARY and a common jury on the 3rd, 4th, and 6th of June.

Mr. O'Malley, Q.C., Mr. Macqueen, and Mr. Couch, for the petitioner.

Mr. Power, Q.C., Dr. Spinks, and Mr. Keane, for the respondent.

The jury found a verdict for the petitioner.

On the 29th of June, *Mr. Macqueen* moved for a decree on the above verdict, and prayed for an order giving Mrs. Suggate the custody, maintenance, and education of the children. Affidavits as to the parents and their respective conduct to the children were before the Court. He submitted that the rule laid down in 'Bishop on Marriage and Divorce,' s. 643, would apply to the present case:—"Upon principle, therefore, the rule would seem to be that, *primâ facie*, after separation, the father is entitled to the custody of the children, unless there is a divorce for his fault, in which case the mother is entitled; yet that the *primâ facie* right must always be subject to superior claims, that is, the good of the children." This last point was much considered in the French courts. In the present case, Mrs. Suggate's character was preferable, and her mother would make arrangements for the support and education of the children. He cited *Talbot v. The Earl of Shrewsbury*, 4 Myl. & Cr. 673; *Re Tomlinson*, 3 De G. & Sm. 371.

1859.

July 25.

SUGGATE
v.
SUGGATE.

Dr. Spinks, contra, contended that the Court was not in a position to make the decree prayed. The only point in issue before the jury was cruelty, and though on that their verdict was in favour of the petitioner, yet a Matrimonial Court was bound to notice condonation when it clearly appeared on the evidence, as it did in this case, by the proof of continued cohabitation after the last act of cruelty charged in the petition.

Cur. adv. vult.

THE JUDGE ORDINARY: This was a suit for judicial separation, instituted by Sarah R. L. Suggate against her husband, Alfred Suggate, on the ground of cruelty.

Several specific acts of cruelty were alleged in the petition. The respondent, by his answer, denied the cruelty alleged, and that issue was tried before me by a jury, who found that the respondent had been guilty of cruelty as alleged. In the course of the trial, it appeared that the petitioner had continued to cohabit with her husband after the acts specified in the petition; but it also appeared that, on a subsequent occa-

1859.

July 25.

SUGGATE

v.

SUGGATE.

sion, when a dispute arose about some banker's deposit-notes and some copies of letters, he was guilty of great violence towards her, and she then quitted his house and went to her mother's, where she still remains. Upon this state of facts, Dr. Spinks, relying upon the dictum of Lord Stowell, in *Beeby v. Beeby*—that condonation, although not pleaded, if clearly proved, might be sufficient to deprive the complainant of a remedy—prayed the Court not to pronounce a decree for judicial separation, on account of the cruelty proved, the evidence showing that it had been condoned. I am far from saying that, if there had been nothing else in the case but a verdict finding cruelty and clear evidence of condonation, I should not have acted upon the dictum of Lord Stowell, and have refused a decree; but if I am to notice condonation, although not pleaded, it would be quite contrary to justice if I were not also to notice evidence of subsequent acts by the husband, which sufficed to revive the cruelty condoned; I therefore feel bound to reject Dr. Spinks' prayer, and to found a decree on the verdict of the jury.

I have next to consider the application made by Mrs. Suggate, that she may have the custody of her children the issue of the marriage. There are four,—three sons of the ages respectively of nine, six, and two, and one daughter aged four years. This application was not rested entirely on the ground that the misconduct of the husband had obliged her to seek a judicial separation for her own protection; it was contended also that his conduct was immoral as well as cruel, and that his habits and conversation was such as to render it improper that he should be entrusted with the care of his children. On the other hand, some attempts were made to show that the petitioner was herself in the habit of using intemperate language, was extremely dirty in her habits and careless, and was not qualified to bring up her children well. I will not go through these affidavits in detail; suffice it to say that I have examined them carefully, and have come to the conclusion that they do not establish any case against Mrs. Suggate.

On the other hand, I do not find reason to impute to Mr. Suggate any want of affection to his children, although I believe he has occasionally done acts towards them of a very objectionable nature for the purpose of annoying his wife.

With regard to his morality, that was seriously impeached by the copies of letters in his own handwriting which were given in evidence, and which purported to have been addressed by him to some young female, whose identity was not established. Mr. Suggate gave a very ingenious, but not very credible, answer to this charge, viz. that his wife having frequently remained away from his house with her own parents, in order to excite her jealousy, and induce her to remain at home, he composed these letters, intending that she should find and read them. The letters contain very strong internal evidence that they were not written for any such innocent purpose. In one of them, dated when he was in London, he says, "I shall be down tomorrow, thank God; but what do I say? to be near my beloved I must be nearer one I cannot love, and that is torture to me till she goes away again." In another. "Her mother goes today if she can get a conveyance, and the two boys with her." At the conclusion, "Her mother does not go till tomorrow; I wish the whole lot were going." And the Court is invited to believe that these letters were written by a fond husband and father, in order to induce his wife to remain at home, and not to take her children to her mother's. But we have his own account of these papers, differing essentially from that which he now pretends to be the truth. In addition to this, there is his own affidavit, filed in the month of June, giving such a picture of his wife's habits and conduct, that, if it be true, it was hardly possible that he could wish her to remain at home. I cannot believe both that affidavit and the statement made by him in court of the purpose for which the letters were written. I am sorry to say that I do not believe either. The affidavit is contradicted by the other evidence in the cause, and his evidence by the contents of his letters, and by his own assertion that they were written for no other eye than his own.¹ If his present account

1859.

July 25.

SUGGATE

v.

SUGGATE.

¹*"Lowestoft, July 24th, 1858.**"My dear Wife,*

"A bill for your conveyance was sent here, 10s.; I can only say if you continue to do this, I will sell your dresses and all your things to pay such bills, and insist upon having two children away with me. But you surely would not wish to injure me in my business by endeavouring to use those papers against me—papers that were written

1859.
July 28.
—
SUGGATE
v.
SUGGATE.

of the letters were true, he would still remain subject to the imputation of having done a grievous injury, not to his wife, but to some innocent female. There is enough in them to direct suspicion against some individual not named. Probably few, if any, in the neighbourhood, would entertain much doubt as to the party to whom he pretended to address them, and few would believe that the intercourse between them was innocent. If he had not in truth corrupted the mind of a female pupil, he was quite willing, for the sake of his own domestic advantage, to let the world suppose he had done so. A man capable of so much heartless baseness is not the person on whose veracity much reliance can be placed.

The conclusion at which I have arrived is, that the wife, as an injured party, had good ground for seeking a judicial separation, and that she ought not to obtain it at the expense of losing the society of her children; that I am not satisfied that her habits or conduct are such as to render her in any way unfit to have charge of them; that with respect to the respondent, if he is deprived of the society of his children, that is the consequence of his own misconduct; and in addition to his ill-treatment of his wife, I have but too much reason to think that they would not be brought up as carefully and morally by him as by their mother, and therefore, as an act of justice towards the petitioner, and for the advantage of the children, I order that they be kept in her custody until they respectively attain the age of fourteen years; the father to be kept informed from time to time of the place or places where for no *other eye than mine*—papers which I am sure you took; now think well before you drive me to desperation, you will thus only make things worse; with love to my dear children,

"I remain yours,
"ALFRED."

On the 28th of July she wrote to him to send some of her and the children's clothes, to which he replied:—

"Lowestoft, July 29th, 1858.

"Dear Wife,

"I will not undertake to send anything till you return me those papers, nor shall anything be taken away. I will quite excuse your denial of them; but they were my own private property, and nothing else will satisfy me. I am sure you took them.

"Yours very truly,
"A. A. SUGGATE."

the children are residing, and to have access to them once a week for two hours, between 10 A.M. and 4 P.M., in the presence of some person to be appointed for that purpose by the petitioner. The Court has been informed (somewhat irregularly indeed) that the mother of the petitioner will provide funds for their education, and I hope such will be the case, but if not, the Court will probably, ere long, be in a position to vary its decree as to the custody of children from time to time, as circumstances may require.¹

1859.

July 25.

SUGGATE
v.
SUGGATE.

(Before the JUDGE ORDINARY, on motion.)

SUGGATE v. SUGGATE.

August 3.

SUGGATE
v.
SUGGATE.

*Practice.—Taxed Costs against Husband.—Number of Counsel.
—Expenses of local Attorney.*

The general principles of taxing costs against a husband in matrimonial cases are the same as in other causes. The rule of the Ecclesiastical Courts not to allow more than two counsel on taxation is not applicable where the evidence is oral in open court. Where a London attorney conducts the suit, no expenses of a local attorney will be allowed on taxation against the husband.

This was a question on the taxation of the wife's costs in the last-mentioned suit, who had obtained a verdict and decree in a petition for judicial separation, by reason of cruelty, as against the husband. The bill presented for taxation was £361. 4s. 10d.; the registrar had reduced it to £265. 16s. 7d.

This taxation was objected to on both sides.

Dr. Spinks, on behalf of the husband, objected to the following items allowed:—£7. 7s. for instructions for brief, on behalf of the petitioner, in support of application for decree of judicial separation, and for the custody of the children; £8. 10s. for drawing the said brief; the charges for attending on and employing three counsel on behalf of the petitioner, and the consequent expenses of three copies, briefs, etc.,

¹ This power is now given by 22 & 23 Vict. c. 61, s. 4.

1859.

August 3.
SUGGATE
v.
SUGGATE.

throughout the cause; the expenses attendant on the postponement of the cause on 16th May, inasmuch as neither the respondent nor his proctors received notice of the cause having been appointed to be heard till the morning of that day; certain refresher fees paid to counsel on two occasions. With respect to three counsel, this is a matter generally within the discretion of the registrar; but not so in the Divorce Court in cases for judicial separation, where it will follow, unless there is good reason to the contrary, the rules of the Ecclesiastical Courts, where more than two counsel would not have been allowed in taxing against the husband, who must generally pay the costs of both sides. Only five witnesses were examined for the wife.

Mr. Macqueen, on behalf of the plaintiff, objected to the registrar's having disallowed the following items:—Two journeys to London and expenses of the managing clerk of the solicitors at Beccles, for the purpose of attending the trial—all items in the bill for close copies of the proceedings sent to the said solicitors; the expenses of one of the petitioner's witnesses in town, as not a necessary witness.

THE JUDGE ORDINARY: I am of opinion that the registrar is right throughout; it may bear hard on the husband, who has to pay the costs on both sides, but it is inevitable. I have endeavoured to ascertain the principle on which the wife's proctor's costs used to be taxed; I find that it is the same as in other cases, and that no distinction was made because the husband has to pay the costs on both sides. It is true that, under the old practice, two counsel only would have been allowed; but where the evidence is given orally in open court this principle is inapplicable: there are not only a party's own witnesses to be examined, but the witnesses on the other side to be cross-examined. As to this particular case, it lasted half Friday, all Saturday, and till late on Monday. On the other hand, I quite approve of disallowing the items for the close copies and expenses of the attorneys' clerk attending the trial. It would be very hard if throwing open the Court to the profession generally were to compel the husband to pay for the double expenses of a London and country attorney.

(Before the JUDGE ORDINARY.)

1859.

August 3.

MATTHEWS v. MATTHEWS.

MATTHEWS

v.

MATTHEWS.

Deed of Separation.—Petition for Judicial Separation.—Lapse of Time.

A. married in 1844, and lived in the same house with her husband till 1853, when a deed of separation, reciting mutual differences, etc., was executed, and the cohabitation ceased. In 1856 A. petitioned for judicial separation, and proved certain acts of cruelty. The Court dismissed the petition.

Lapse of time is not an absolute bar to such a suit, but in connection with other matters, such as a deed of separation, will be taken into consideration.

This was a petition for judicial separation at the suit of the wife, alleging desertion and cruelty. The petition stated the marriage of the parties in July 1844, and cohabitation till the month of November, 1852, at Chipping Norton, where the husband carried on the business of a grocer; that for two or three years previously to November, 1852, the petitioner had not regularly slept in the same bedroom with her husband, and that from November, 1852, till the 1st October, 1853, though resident in the same house, the husband and wife occupied different apartments; that there were two children of the marriage, of the respective ages of eleven and eight years; that since the 1st of October, 1853, Matthews had deserted the petitioner and his children, from which time she had maintained herself. The petition further set forth that in the year 1847 Matthews commenced to ill-treat the petitioner, and specified several acts of violence down to the time of his leaving her in October, 1853.

The answer of the husband simply denied the desertion and cruelty.

It appeared at the hearing that in 1848 Matthews bought the house and shop at Chipping Norton, where he carried on his business, and borrowed on mortgage £1,000 belonging to the trustees of his wife's marriage-settlement. There was no

1859.
August 3.
MATTHEWS
v.
MATTHEWS.

doubt that the husband and wife had been on bad terms ; that he had been given to drink and neglected his business, and evidence was given of certain acts of violence on his part towards her.

As regards the alleged desertion, it appeared that in July, 1853, Matthews sold to his brother-in-law, Clark, the house and business ; that an indenture, dated the 1st of October, 1853, between George Matthews of the one part, and Stephen Clark of the other, recited (among other things) that differences had arisen between Matthews and his wife, and that they were mutually desirous to live separate ; that it had been agreed between Matthews and Clark, as the brother and on behalf of the said Ann Matthews, that Clark should indemnify Matthews against all liability to the debts of his wife, and that Matthews, in consideration of such undertaking, and of certain advances made by Clark and of the advantage which Matthews had for some time past derived from having lived with his wife and children in the house and at the expense of Clark, assigned to Clark upon certain trusts, a policy of assurance and his reversionary life-interest under his marriage settlement ; and that so long as Clark observed his covenants, etc., therein, Matthews would permit his wife to live apart as if she were a *feme sole*, and have the entire custody and control over their children, and would not take up his permanent abode within twenty miles of Chipping Norton without Clark's consent in writing.

Dr. Phillimore, Q.C., and Mr. Prentice, for the petitioner.

Dr. Spinks and Mr. Field, for the respondent.

Cur. adv. vult.

THE JUDGE ORDINARY: The parties in this suit married in 1844; the husband was then a grocer. Bad habits on his part began in 1847, and so matters went on till a deed of separation was executed in 1853. [The learned Judge Ordinary here stated the substance of the above indenture.] In consequence Matthews gave up his shop and assigned the policy of insurance ; he relinquished his right in remainder to

the money settled, and went away and never attempted to violate the covenants of the deed.

The wife now petitions on the ground of cruelty, and she gave evidence of cruelty, which, if taken according to the letter, would have been sufficient to call for the interposition of the Court if the suit had been then instituted; but my confidence in the accuracy of the statements is much diminished by the evidence of the apothecary and shop apprentice. It is not improbable that the wife, reflecting on the conduct of a husband for whom her regard was extinguished, has drawn to herself an exaggerated picture of the evils which she had to endure. If she had then good grounds for applying for a divorce *à mensâ et thoro*, I cannot understand why it was not done, unless she preferred the private arrangement as a whole. She is therefore now in this dilemma—either there were not sufficient grounds for such a proceeding, or she advisedly abstained from it, preferring the remedy of a separation by deed.

The case of *Walker v. Walker*, 2 Phil. 153, was cited as an authority for dismissing the petition. It was not exactly in point, but I think the principle is applicable. The ground on which the Ecclesiastical Court in such cases interposed was to protect the person of the wife from injury; in fact, the wife in this case is in no danger; she elected her own remedy when the transactions were recent, and cannot, I think, now call upon the Court to act as if they had just preceded the petition.

I do not mean to put the lapse of time as an absolute bar, but I think that, taken in connection with the deed of separation, it shows that this is not a *bond fide* application made for the protection of the wife, but for some collateral purpose, and that the Court ought not to grant the prayer of the petition. It must therefore be dismissed.

1859.

August 8.

MATTHEWS
v.
MATTHEWS.

1859. (Before the Full Court,—THE JUDGE ORDINARY, WILLIAMS, J.,
November 19. and BRAMWELL, B.)

HASWELL v. HASWELL AND SANDERSON.
v.
HASWELL AND SANDERSON. *Petition for Dissolution.—Separation before Adultery charged.*
—20 & 21 Vict. c. 85, s. 31.

When the petitioner has proved the allegations of his petition, there must be affirmative evidence of "desertion, wilful separation," etc., to enable the Court to exercise the discretion given it by sect. 31 of Divorce Act, of refusing to pronounce a decree.

Quære, whether petitioner's counsel has a right to examine him to disprove the existence of such circumstances as, if established, would raise a case for the discretion of the Court. If the Court, to satisfy doubts raised by the petitioner's witnesses, examine the petitioner under the 43rd section, his counsel will be at liberty to suggest any question tending to explain facts which may have been elicited by the examination of the Court.

This was a petition for dissolution of marriage, at the suit of the husband, by reason of the wife's adultery. No appearance was given for the wife. The marriage took place in May, 1852; the petitioner was described as an artist, and was about twenty-one years of age at the time of the marriage. The respondent was then living with her mother, a Mrs. Gilbert, who kept an eating-house in Eastcheap. The petitioner's father lived in the neighbourhood, and he and his family had some acquaintance with Miss Gilbert. The marriage took place without the knowledge of the parents of either party, apparently because the petitioner had no means of commencing housekeeping. He visited his wife from time to time at her mother's till about November, 1852, when, in consequence of alleged misconduct on her part, he refused to see her any more. Subsequently to this, the petitioner seems to have passed a good deal of his time in Scotland, coming backwards and forwards to London, where he sometimes stayed at his father's house; sometimes in chambers in Lyon's Inn. At some period after the cohabitation had ceased, and while the petitioner was absent in Scotland, his father found a letter in his desk in the handwriting of the respondent, and signed Mary

Jane H. Mr. Haswell, sen., sent for her, and she acknowledged that it was her letter, and that they had been married. Mr. Haswell and his family seem to have been inclined to receive her kindly ; but on representation by letter from the son of her misconduct, and of his reasons for discontinuing cohabitation, they saw no more of her, or she ceased to call on them.

1859.

November 19.

HASWELL

v.

HASWELL AND
SANDERSON.

Subsequently there was no doubt that she had cohabited with Sanderson.

Mr. Bayley, who had known both the parties, and had married a cousin of the respondent, said, that he had talked with the respondent about a quarrel with her husband ; that Mrs. Haswell had said that her husband had caught her with Holmes. "John came in one day in a hurry, and came into " the front room, and caught me with Holmes, and that was " the beginning of the quarrel."

Dr. Phillimore, Q.C. (Dr. Spinks with him), conducted the petitioner's case, and submitted that if under the 31st section of the Divorce Act, the Court suspected the petitioner of "wilfully separating himself without reasonable excuse," it would, under the power given by 43rd section, allow the petitioner to be examined. This has been done in several cases.

THE JUDGE ORDINARY: In those cases the petitioner was examined hostilely by the Court. I apprehend that under the 43rd section the party may be called by the other side or the Court, but not to prove his own case.

THE JUDGE ORDINARY (after consultation): We have considered this point, and as regards the discretionary power of the Court under the 31st section, it appears to us that when the petitioner has established his petition, alleging adultery against the wife, a case for the exercise of the discretion of the Court does not arise, unless it is made out affirmatively that the husband deserted or wilfully separated himself without reasonable excuse, etc. As the case at present stands, you have established your allegation of adultery ; the fact, that the husband withdrew himself without reasonable excuse is not

1859.
November 19.

HASWELL
v.
HASWELL AND
SANDERSON.

affirmatively established. The Court are not prepared to accede to your argument on the 43rd section; they would be glad to have the point regularly argued by counsel for the respondent as well as for the petitioner. But the Court think that they may properly put the petitioner in the witness-box to satisfy their own minds whether a case arises in which they would be called upon to exercise their discretion under the 31st section.

The petitioner was then sworn and examined by the Court. He said, that the quarrel which led to his abandoning his wife took place some time before the Duke of Wellington's funeral; that he found his wife in a room upstairs with Mr. Holmes, his hand in her bosom, and one arm round her waist—she was sitting quietly by him on the sofa; that he took some hours to consider what he should do, and then determined to have nothing more to do with her, and never went to her mother's house again; he then went to lodge in Lyon's Inn, where his wife came to him once to ask him to return letters, etc. This he did, and the letter which his father afterwards found he supposed was then inadvertently kept back. He had no particular recollection of that letter; it was probably written when he was living at Kingsland, where he had intended to provide a house for his wife.

[The Court remarked to counsel that they were at liberty to suggest any question that might serve to explain anything that the Court might have elicited, which seemed adverse to the petitioner.]

THE JUDGE ORDINARY: The Court has felt some difficulty in putting a construction on this latter branch of the 31st section. We are satisfied that the petitioner's case is proved, and there is no proof of any of the matters in the first part of the section mentioned which would bar the Court from granting a dissolution. So far, then, the Court is bound to pronounce a decree. But now comes the proviso, "That the Court shall not be bound to pronounce such decree if it shall find that the petitioner has, during the marriage, been guilty of adultery, or if the petitioner shall, in the opinion of the Court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty to-

“wards the other party to the marriage (none of these have 1859.
 “any application to the present case), or of having deserted November 19.
 “or wilfully separated himself or herself from the other party
 “before the adultery complained of, and without any reason-
 “able excuse, or of such wilful neglect or misconduct as has
 “conduced to the adultery.” It is, perhaps, not very clear
 what the word deserted here means; it may be equivalent to
 “leaving her destitute.” If “desert” stood alone in this
 clause it might signify simply “to abandon;” but it is fol-
 lowed by the term “wilful separation,” which is limited by
 “without reasonable excuse,” which applies equally to all the
 preceding words. Now, there is evidence of the husband
 going away in consequence of a quarrel about Holmes. Ac-
 cording to Bayley’s evidence, the wife herself assigned this to
 him as the cause of the quarrel. The Court cannot say that
 this was not a reasonable excuse. It is not necessary to prove
 all the precise circumstances; the expression “caught me with
 “Holmes” is equivocal; but on examination of the party he
 said that he had found his wife submitting to indecent liberties,
 and on that ground he did not again return to her mother’s
 house, where she resided. It is not necessary for the Court to
 say that this would have justified him in turning her out of
 his house; that it would have enabled him to resist an action
 of debt for necessities supplied her; or would have been a
 sufficient answer in a suit for restitution of conjugal rights.
 But the question is, whether we are in a position to exercise a
 discretionary power. The adultery has been fully proved, and
 we cannot say that the petitioner comes within the description
 of a person “wilfully separating himself without reasonable
 “excuse.” The discretionary power therefore does not exist.
 The petitioner is entitled to a decree.

Decree, dissolution of the marriage.

HASWELL
 v.
 HASWELL AND
 SANDERSON.

CASES

IN THE COURT OF PROBATE.

1859. In the Goods of HARRIET S. L. WEIR (Widow,
March 9. deceased), on Motion.

In the Goods of HARRIET S. L. WEIR. *Administration.—Further Duty payable.—Sureties.—Amount of Bond.*—55 Geo. III. c. 184, ss. 41, 42.—20 & 21 Vict. c. 70, ss. 81, 82.

Administration was taken out under £20,000, and the usual bond in a penalty of double that sum entered into. The administratrix subsequently received a sum of money from a bankrupt estate indebted to the deceased, which made it necessary to reswear the amount under £25,000. The Court, under the 82nd section of 20 & 21 Vict. c. 77, directed the registrars of the principal registry to receive a separate bond in the penalty of £10,000, which, together with the original bond, would be double the amount of the sum under which the estate was to be resworn.

In this case the administration of the personal estate of Mrs. Weir had been granted on the 25th February, 1858, to Eliza Maxwell, a sister and one of the next of kin of the deceased, and the usual administration bond with two sureties in the penalty of £40,000, being double the amount under which the estate was sworn, had been executed. After the administration a sum of £425 had been received by the administratrix from the estate of a bankrupt who was indebted to the deceased, which raised the value of the deceased's estate above £20,000, and it was now necessary to reswear the same as under £25,000, and to pay a further duty on the administration; (55 Geo. III. c. 184, ss. 41, 42). The latter section provides,

"That in cases of letters of administration on which too little stamp duty shall have been paid at first, the Commissioners of Stamps shall not cause the same to be duly stamped in the manner aforesaid until the administrator shall have given such security to the Ecclesiastical Court or Ordinary by whom the letters of administration shall have been granted as ought by law to have been given on the granting thereof, in case the full value of the estate and effects of the deceased had been then ascertained."

1859.

March 9.

In the Goods of
HARRIET S. L.
WEIR.

The administratrix, with the same two sureties, had duly executed a bond in the penalty of £10,000, which, with the former bond, would be double the amount under which the effects of the deceased were now sworn; but the registrars of the principal registry of the Court refused to receive this bond without an order of the Court, on the ground that they had no power to take several bonds; they required a fresh bond, with two sureties in the penalty of £50,000. By the practice of the registry the original bond would be retained, and the sureties would thus be liable to the amount of £90,000.

Mr. Aspland now moved the Court, under the above circumstances, to order that on payment of the further duty on the letters of administration, the administration-bond might be taken in the penalty of £10,000 instead of £50,000. The sections of the Probate Act, 20 & 21 Vict. c. 77, applicable, are the 81st and 82nd. The former enacts that "every person to whom any grant of administration shall be committed shall give bond to the Judge of the Court of Probate, to enure for the benefit of the judge for the time being; and if the Court of Probate, or (in the case of a grant from the district registry) the district registrar shall require, with one or more surety or sureties, conditioned, etc., which bond shall be in such form as the judge shall from time to time by any general or special order direct," etc. The 82nd provides that "such bond shall be in a penalty of double the amount under which the estate and effects of the deceased shall be sworn, unless the Court or district registrar, as the case may be, shall in any case think fit to direct the same to be reduced, in which case it shall be lawful for the Court or district registrar so to do, and the Court or district re-

1859. "gistrar may also direct that more bonds than one shall be
 March 9. "given, so as to limit the liability of any surety to such
 In the Goods of "amount as the Court or district registrar shall think rea-
 HARRIET S. L. "sonable." These sections appear to give no power to the
 WELK. registrars of the principal registry, but it seems a fit case for
 the Court to act upon, and not to oblige a further bond in the
 penalty of £50,000 to be given.

SIR C. CRESSWELL granted the motion as prayed.

April 27 and In the Goods of ANN ALMOSNINO (Widow, deceased), on
 May 4. Motion.
 In the Goods of ANN ALMOS- *Executed and unexecuted Testamentary Papers.—Reference.*
 NINO. *—Parol Evidence.*

B. produced a sealed envelope, on which was written, "I confirm the
 "contents written in the enclosed document in the presence of," etc.
 This was signed by her, and attested by two witnesses. On her
 death, two days subsequently, the envelope, still sealed with the
 same seal, was found on her table directed to J. A., her nephew; on
 being opened, it was found to contain a testamentary disposition in
 the form of a letter addressed to her nephew. The Court admitted
 parol evidence of the identity of the enclosed paper so found after
 her death with the document referred to by the executed memoran-
 dum, and granted probate of the envelope and contents to J. A., as
 executor according to the tenor.

In this case the testatrix died on the 31st of December, 1858.
 On a table in her room was found an envelope, which had
 been sealed, but the seal was broken, directed to Mr. Azuelos,
 No. 62, Bishopsgate Street Without. Within this was another
 envelope, sealed and directed "For Mr. Azuelos, No. 62, Bi-
 "shopsgate Street Without. I wish him to open this letter
 "immediately I am dead, or, if he should not be in London
 "at the time of my death, it must be delivered to Mr. S. Al-
 "mosnino, No. 11, Bevis Marks, City."

On the inner envelope was also written, "I confirm the con-
 "tents written in the enclosed document, in the presence of

"Richard Morse and Sarah Praeger, this 29th day of December, 1858.

1859.

April 27 and
May 4.

"A. ALMOsnino,

"RICHARD MORSE, 8, Charing Cross.

"SARAH PRAEGER, 25, Esher Street,

"Upper Kennington Lane."

In the Goods of
ANN ALMOsnino.

Inside this envelope, when opened, was found a paper in the deceased's handwriting, commencing thus :—

"My dear Nephew,—You will be doing me a charity if you will comply with my last wishes ; I always found you very kind, and I hope you will not refuse my last request," etc. The paper proceeded to give directions as to her funeral, and the disposition of her property ; it was signed by her, but not attested ; and mentioned no executor. From the affidavit of Judah Azuelos, it appeared that he was nephew of deceased's husband, and was in the habit of visiting the deceased, who had frequently mentioned to him a paper containing instructions to be attended to after her death, and addressed to him ; that on the 29th of December, 1858, he told her that such a paper ought to be signed by two witnesses, when the deceased sent for Morse, and signed the memorandum of confirmation written by Morse on the inside envelope ; that the paper writing and the addresses on the envelopes were in the deceased's handwriting ; that the seal on the inner envelope remained unbroken when the memorandum was written (the deceased objecting to have it opened), and that the same seal was found unbroken after her death when the inner envelope was cut open.

Richard Morse, at whose house the deceased lodged, deposed that he went into her room on the 29th of December, 1858, at Mr. Azuelos' request, and wrote the memorandum on the inner envelope, which was signed by the deceased in his presence, and that of Sarah Praeger, and that they then attested it ; he gave the same account of the condition of the envelopes and seals as Azuelos did, which was confirmed by S. Almosnino, who, after deceased's death, had cut open the inner envelope.

Mr. Dowdeswell moved the Court to decree probate of the paper writing and of the inner envelope, as together containing the will of the deceased, to Judah Azuelos, as executor ad

April 27.

1859. cording to the tenor. Parol evidence is admissible for the
 April 27. purpose of showing that the paper writing was the document
 referred to by the memorandum.

In the Goods of
 ANN ALMOS-
 NINO.

SIR C. CRESSWELL: Is there any case in which a paper has been held to be incorporated, by reference, with one duly signed and attested, where there was no description whatever of the paper supposed to be referred to? It seems to me to differ from most of the cases cited in *Allen v. Maddock*,¹ the deceased does not call it a will or testamentary paper, or in any way describe it; the words are simply, "I confirm the contents written in the enclosed document."

Cur. adv. vult.

May 4. SIR C. CRESSWELL: In this case application was made for probate of a paper under rather singular circumstances. The deceased wrote a paper giving directions for the disposition of her property after her decease, and apparently not wishing any one to know the contents, she enclosed it in an envelope on the outside of which, in consequence of a suggestion that any paper to be acted upon after her death ought to be signed by two witnesses, was written, "I confirm the contents written in the enclosed document," etc.; this was duly signed by the deceased and attested by two witnesses. The question is, whether parol evidence can be received to identify the document purported to be confirmed, and, if so, whether the evidence of identity is sufficient? Where a duly executed paper contains a reference to another testamentary paper the Court is at liberty, by parol evidence, to ascertain all the circumstances of the case, so as to place itself, as far as possible, in the situation of the testator, the meaning of whose language it is called upon to declare; for on such occasions the Court of Probate is, to some extent, a Court of construction; but parol evidence is inadmissible to prove intention. In *Allen v. Maddock*, 11 Moore, P. C. 427, all the cases on this point were elaborately reviewed. Here the fact to be proved is the identity of the instrument now produced with the document referred to in the memorandum indorsed on the inner envelope. The parol evidence shows that the envelope was sealed in a

¹ 11 Moore, P. C. 427.

particular manner, and that it was found so sealed after the testatrix's death, without any appearance of the seal having been broken. The memorandum refers to only one paper, and one only was found in the envelope when opened. I have no doubt that the document referred to by the deceased was the paper found in the envelope after her death, and shall decree probate as prayed.

1859.

May 4.

In the Goods of
ANN ALMOS-
NINO.

Probate granted.

In the Goods of LUIS BIANCHI (deceased), on Motion.

June 1.

Administration.—Practice.—Administration of the Effects in England of a domiciled Brazilian granted to an Attorney for that purpose duly appointed.

In the Goods of
LUIS BIANCHI.

A. died domiciled in Brazil, intestate, leaving a widow and several children (all minors), and some personal property in England. The Judge of Orphans, a functionary in Brazil charged with the administration of estates belonging to minors, having appointed B. guardian of the children of the deceased, who appointed C., the Brazilian minister at Turin, his attorney in the matter, with power of substitution, issued letters of request to the judicial authorities in England to collect and deliver the property of the deceased to C. or his representative. C. appointed D., resident in England, his substitute.

Authenticated copies of the proceedings before the Judge of Orphans, and of the power of attorney to C., the original power of attorney to D., with affidavits of the facts of the case, and of the law of Brazil, having been filed, the Court granted administration to D.

Luis Bianchi, late of the city of Bahia in Brazil, died at Teneriffe in August, 1856, intestate, being then on his way to Europe for a temporary visit, leaving a widow, Angelique Bianchi, now the wife of Eliziario de Morais, and seven children, who are still minors.

The deceased, who was a Sardinian by birth, at an early age abandoned his domicil of origin, and acquired a domicil at Bahia in Brazil, where he amassed a considerable fortune. Upon his decease his widow returned to Bahia, and the succession to his estate, which by the law of Brazil devolved to his children in equal shares, was opened before the Judge of Orphans, the lawfully constituted authority in cases of minority to superintend the collection and administration of the

1859. estate; for which purpose he is required to make inventories of
 June 1. all property in which the minors are interested, and to make
 In the Goods of partition thereof as between such minors and the widow, who
 LUIS BIANCHI. is required to bring to such partition all the property that re-
 mained at the death of the husband, and who cannot alienate
 or appropriate to herself any portion of the estate prior to
 such partition.

The widow, who was in the first instance appointed by the Judge of Orphans the tutrix or guardian of the minor children, was, upon her subsequent marriage with her second husband also a Brazilian subject, *ipso facto* by the law of Brazil, deprived of the guardianship of the children; and the Judge of Orphans, as required by the law of Brazil, appointed another guardian in her stead, viz. Lieut.-Col. Lourenço de Souza Marques, who is now the guardian of the minor children. The deceased at the time of his death had the sum of about £4,000 in the hands of Messrs. Heath and Co., of London.

On the 12th of July, 1858, the Judge of Orphans of Bahia, who, if the property is out of his jurisdiction, is required by the law of Brazil to apply to the competent authorities of the place where such property is situate to recover such property, with a view to the due administration thereof, issued letters of request to the Judge of Orphans, or other judicial authorities in England, to collect and deliver the property of the deceased to the Brazilian minister at Turin, Cesar Sauraw Vianna de Lima, the attorney, with power of substitution, of Lourenço de Souza Marques, in order that the same might be remitted to Bahia, and enter into the future distribution of the property. Under this power of attorney, the Commander C. S. Vianna de Lima executed a power of attorney, appointing Mr. W. H. Clerk his substituted attorney in London, for the purpose of receiving the personal estate of the deceased, and expressly authorizing him to obtain letters of administration of the personal effects of the deceased in England.

Proceedings had been also instituted before the Judge of Orphans at Bahia, in respect to the domicil of the deceased, and on the 2nd of April, 1859, sentence was given to the following effect, viz.:—"Having seen the depositions of the witnesses, I adjudge that the deceased Bianchi constantly

“declared that he had abandoned for ever his primitive do- 1859.
 “micil at Genoa, establishing it definitively in the city of June 1.
 “Bahia.”

An affidavit by Mr. W. H. Clerk had been filed in support In the Goods of
 of the foregoing statement, to which was annexed the original LUIS BIANCHI.
 letters of request from the Judge of Orphans; authenticated
 copies of the proceedings had before him with reference to
 the deceased's domicile, and of the power of attorney from the
 guardian of the minors to Cesar Sauran Vianna de Lima;
 also the original power of attorney from the latter to Mr.
 Clerk.

An affidavit by a Doctor of Laws and Advocate of the
 Court of Justice of the city of Penedo, in the Brazils, as to
 the law of Brazil in reference to the matters above referred
 to, was also filed.

Dr. Spinks moved the Court to decree letters of adminis-
 tration of the personal estate and effects of the deceased in
 England to be granted and committed to William Henry
 Clerk, as the attorney of Cesar Sauran Vianna de Lima, the
 attorney, with power of substitution, of Lourenço de Souza
 Marques, the guardian of the minor children of the deceased,
 under the usual security.

SIR C. CRESSWELL: I am satisfied. The grant will be
 made to Mr. Clerk, the Attorney of the Brazilian minister at
 Turin. *Motion granted.*

In the Goods of MARIA WORMAN (deceased), on Motion. June 15.

Desertion of Husband.—Protection Order.—Administration granted to the Wife's Next of Kin of such Property as had been acquired by her after the Desertion. In the Goods of
 MARIA
 WORMAN.

M. W. having been deserted by her husband, obtained a protection
 order, under 20 & 21 Vict. c. 85, s. 21, by reason of his desertion. On
 her death, in the life of her husband, intestate, the Court decreed
 letters of administration, limited to such personal property as she had

1859.

June 15.

In the Goods of
MARIA
WORMAN.

acquired or become possessed of since the desertion, without specifying of what that property consisted, to be granted to one of her next of kin.

Maria Worman, the deceased in this case, was married in 1847 to John Worman. On her marriage she was possessed (amongst other things) of certain leasehold property, and of £100 in a bank, which were then secured to her separate use. On the 13th of April, 1858, she was deserted by her husband. Shortly afterwards she received from him a letter, dated April 21, 1858, in which he enclosed the joint promissory note of W. C. Morris and J. Morris for £50, payable to himself John Worman or bearer, and told her to take it up whenever she required it, and to sell any of the furniture he had left in the house which she did not want for her immediate use. On the 25th of July, 1858, she obtained a protection order, under 20 & 21 Vict. c. 85, s. 21, by reason of her husband's desertion. The order was signed by two Justices of the Peace in Petty Sessions held for the district of Neath, in the county of Glamorgan, and was subsequently entered with the registrar of the county court at Neath, within the jurisdiction of which she then resided.

She died on the 8th of February, 1859, without child or parent, leaving her husband, five brothers and three sisters, her surviving, and property, consisting of the said note for £50 with interest due thereon, of £50 in a bank at Merthyr, of a note of hand for £35 payable to herself, of a small sum due to her for the sale of some furniture, and some wearing apparel.

Dr. Wambey moved for letters of administration of the personal estate and effects of the deceased, whereof she became possessed after the desertion of her husband, on the 13th day of April, 1858, to be granted to Wm. Davies, her natural and lawful brother and one of her next of kin, under the sum of £200. He submitted that the probate would include the promissory note for £50, which had been sent to the wife by the husband after his desertion, as well as the other property she had left.

SIR C. CRESSWELL: I can make no order as to the promis-

sory note. The Divorce Act (1857), sect. 21, enacts "that a
"wife who has obtained a protection order by reason of her
"husband having deserted her, shall during the continuance
"thereof be and be deemed to have been during such deser-
"tion of her, in like position in all respects with regard to
"property as she would be if she had obtained a decree of
"judicial separation."

1859.

June 15.

In the Goods of
MARIA
WORMAN.

And by the 25th section, referring to property acquired by the wife from the date of the sentence of judicial separation, it is provided that "such property may be disposed of by her
"in all respects as a feme sole, and on her decease the same
"shall, in case she shall die intestate, go as the same would
"have gone, if her husband had been then dead." I will grant administration, limited to such property as the deceased acquired since her husband's desertion. I cannot direct the grant to specify of what that property consists. I must leave that to be decided by another Court.

In the Goods of SAMUEL RICHARDSON (deceased), on Motion. November 16.

Renunciation of Executors and Residuary Legatee in Trust.— In the Goods of
Administration de Bonis Non.—Practice. SAMUEL
RICHARDSON.

Where A., B., and C., executors and residuary legatees in trust, had renounced probate or administration, and administration with the will annexed had been granted to the residuary legatee for life, who died, leaving the estate unadministered, the Court refused to allow one of the residuary legatees in trust to retract his renunciation in that character, for the purpose of taking administration with the will annexed of the unadministered estate.

In this case the deceased died in April, 1847, leaving a will and codicil, in which he appointed William Hunter, John Bingley, and the Rev. John Richardson Major, executors and residuary legatees in trust. These gentlemen all renounced probate of the will and codicil, and letters of administration with the will and codicil annexed. In June, 1847, administration, with the will and codicil annexed, was granted by the Prerogative Court of Canterbury to Mary Richardson, as the

1859. relict of the deceased, and residuary legatee for life. She
 November 16. died in August, 1859. Of her two daughters, who were sub-
 In the Goods ofstituted residuary legatees, one died unmarried in September,
 SAMUEL 1859, and the other, a Mrs. Knyvett, died in New Zealand in
 RICHARDSON. the lifetime of Mrs. Richardson, leaving several children re-
 sident in New Zealand, the only persons beneficially entitled
 under the trusts of the will upon the death of Mrs. Richardson
 and her unmarried daughter.

Dr. Swabey now moved the Court to allow Dr. Major to retract his renunciation as residuary legatee in trust, and in that character to take administration, with the will and codicil annexed, of the unadministered estate of the deceased. As executor, Dr. Major could not retract his renunciation after a grant of administration made to a legatee. In support of the motion for a grant to Dr. Major as residuary legatee in trust, he cited *In the Goods of Rebecca Bullock*, 4 N. C. 645.

Cur. adv. vult.

On a subsequent day, SIR C. CRESSWELL said: You have produced no sufficient authority to induce me now to make the grant as prayed; the grandchildren in New Zealand must be cited.

Motion rejected.

December 21. In the Goods of ELIZABETH DARKE (deceased), on Motion.

In the Goods of Administration with the Will annexed.—Executors.—Corpo-
 ELIZABETH ration aggregate.—Appointment of Syndic.—Practice.
 DARKE.

When a corporation aggregate have been appointed executors of a will, the Court will, on motion, grant letters of administration, with the said will annexed, to a syndic who has been duly appointed by such corporation to take the grant.

The grant will not be made until the appointment of syndic is before the Court.

Elizabeth Darke, late of Exeter, spinster, deceased, died on the 27th of August, 1859, leaving a will and codicil, whereof

she had appointed the Bishop of Exeter and the Dean and Chapter of Exeter executors. She devised and bequeathed the bulk of her property for the purpose of building and endowing a church in Exeter. 1859. December 21.

In the Goods of
ELIZABETH
DARKE.

The Bishop of Exeter had renounced his right to probate, and the Dean and Chapter of Exeter were anxious that the Court should grant letters of administration, with the will annexed, to R. Barnes, their chapter clerk.

Dr. Tristram moved accordingly. It was stated in 1 Wms. on Executors, 199, 5th Ed., that it had been doubted whether corporations aggregate could be executors, on the ground that they could not take the oath for the due execution of the office; but that it was now settled that, on their being so named, they may appoint persons styled syndics to receive administration with the will annexed, who are to be sworn like other administrators.

SIR C. CRESSWELL: Have the dean and chapter appointed Mr. Barnes as their syndic?

Dr. Tristram: They have not done so formally, but if the Court is disposed to grant the motion, they will make the appointment.

SIR C. CRESSWELL: I cannot grant the motion until the appointment is before me.

Dr. Tristram renewed the application. The dean and chapter had now, by an instrument under their seal, appointed Mr. Barnes their syndic for the purpose of taking this grant. December 21.

SIR C. CRESSWELL granted the motion.

1860.
January 13.

ROBINS AND PAXTON v. DOLPHIN.

ROBINS AND
PAXTON
v.
DOLPHIN.

Practice.—Costs out of Estate.

Where in opposition to a will the defendant relies upon difficult points of law, he will, though unsuccessful, be generally entitled to his costs out of the estate.

This case was originally before the Court on points of law raised on the admission of an allegation responsive to one propounding the last will and a codicil, dated the 11th of April, 1854, of Mary Ann Dolphin (*ante*, p. 37). From the decision of Sir C. Cresswell rejecting the responsive allegation an appeal was carried to the House of Lords. After the points taken in the Court below had been argued, their Lordships directed a second argument as to whether on all the facts of the case the husband had not so conducted himself as to entitle Mrs. Dolphin to acquire a separate domicile. Ultimately they dismissed the appeal without costs (7 H. L. Cas. 390). The case now came before the Court for a formal decree of probate of the will of 1854, and on the question of costs.

Dr. Deane, Q.C. (*Dr. Twiss*, Q.C., with him), prayed that the defendant (the husband) might be allowed his costs out of the estate, on the ground that the whole litigation was caused by the act of the testatrix in making the revocatory codicil. The matter was so difficult of decision that the House of Lords heard a second argument on some points.

Dr. Spinks (*Dr. Wambey* with him) *contra*: The most the Court can do is not to condemn the husband in costs. The litigation was not merely caused by the act of the testatrix in respect to her testamentary papers; the point, that under such circumstances a Scotch divorce could not dissolve a marriage celebrated in England between English subjects, has been ruled over and over again.

SIR C. CRESSWELL: As to the litigation being caused by the act of the testatrix, it was not so in the sense that by any particular act of her own she led her husband into this controversy; but the circumstances were peculiar. I shall treat

it as a case in the old Court; it was commenced there and transferred here, and was a case raising difficult points of law. I understand from the registrar that, when a will was propounded and resisted on a point of law, the costs of the opponents would generally come out of the estate. If it had been simply a question whether a Scotch divorce could dissolve the bond of marriage, it might have been useless to contend for the affirmative; but another point, as far as I know *primæ impressionis*, which is discussed in Fergusson on Divorce, was mooted before me, viz. whether a Scotch divorce would be equivalent to a divorce *à mensâ et thoro*. I held that it was not, and therefore could not enable the wife to acquire a domicile for herself. There was also another question raised in the House of Lords, whether the husband had not throughout the history of the parties so conducted himself as to enable the wife to acquire a new domicile. It cannot be said that the husband was not justified in raising these questions, as the House of Lords found it so difficult to decide them that they ordered a second argument. I think the defendant's costs should come out of the estate.

1860.
January 13.

ROBINS AND
PAXTON
v.
DOLPHIN.

CHARLTON v. HINDMARSH.

*Administrator pendente lite.—Security.—Passing Accounts.—
Payment of Debts.*

January 25.

CHARLTON
v.
HINDMARSH.

An administrator *pendente lite* of personal estate was appointed, on his giving security to the amount of one year's income of the property; his administration to be under the direction of the Court. The Court directed that he should not discharge claims on the deceased's estate, until they had passed before the registrar.

This was a question arising in a cause in which the validity of the will of the late Joseph Hindmarsh was disputed, on the ground that it had not been executed according to the provisions of 1 Vict. c. 27.

SIR C. CRESSWELL pronounced against the will, and from this sentence the plaintiff appealed to the House of Lords. May 18.

SIR C. CRESSWELL appointed G. W. Cram, administrator July 20.

1860. *pendente lite* of the personal estate of the deceased, upon his
January 25. giving security to the amount of one year's income of the pro-
perty in question: such administrator to be subject to the
immediate control and under the direction of the Court. (See
CHARLTON
v.
HINDMARSH. 20 & 21 Vict. c. 77, s. 70.)

December 7. Letters of administration, pending the said suit, issued under the seal of the Court to the said G. W. Cram.

The personal property of the deceased consisted of £1,700, which was out on mortgage, bearing interest at five per cent., and of £4,786. 10s., deposited in Messrs. Lambton & Co.'s bank at Newcastle, on the security of a promissory note, bearing interest at one and a half per cent. only. His debts amounted to £282. 13s. 5d., but one of those for £19. 6s. 6d. was disputed. The administrator (Mr. Cram), in an affidavit, stated that he considered it would be for the benefit of the estate to withdraw a portion of the £4,786. 10s. from the bank, and to apply the same towards the payment of the deceased's funeral expenses and debts, except the one disputed.

January 25. *Mr. Hannen*, upon the above state of facts, moved the Court, on behalf of the said George William Cram, the administrator *pendente lite*, for directions as to the withdrawal of the sum of £4,786. 10s. from Messrs. Lambton and Co.'s bank, part thereof to be applied in payment of such of the claims in respect of the deceased's funeral and testamentary expenses as have been already sent in and deemed correct, and the residue to be invested in the Three per Cent. Consolidated Bank Annuities, or such other stocks or funds of Great Britain, or such other security as the Court shall think fit.

Dr. Spinks appeared for the plaintiff.

SIR C. CRESSWELL: I think that the debts should not be paid until they have been passed before the registrar. The administrator *pendente lite* is, according to the terms of the decree appointing him, to administer the estate under the directions of the Court. Subject to this alteration, I will grant the motion.

DUNN v. DUNN.

1860.
January 25.

Where, in a probate cause, the county court has jurisdiction, the Court may, though application be made in behalf of all the parties to the cause for it to be tried at the assizes, still, in its discretion, direct it to be tried in the County Court.

DUNN
v.
DUNN.

The deceased in this case died in Yorkshire, leaving real and personal estate under £300 and a will, the validity of which was contested on the ground—first, that it was not the will of the deceased; secondly, that it was not duly executed; and thirdly, that the deceased was not of sound mind at the time of its execution.

All the parties to the suit resided in Yorkshire, and the witnesses in the cause were also resident in Yorkshire or at Barnard Castle.

Dr. Tristram moved the Court to direct an issue to be tried at the next York assizes to determine the validity of the will.

SIR C. CRESSWELL: The personal property may not amount to more than £200. If so, the cause would properly come under the jurisdiction of the County Court.

Dr. Tristram: The power given to the Court to direct a cause to be tried in the County Court is discretionary. All the parties consent to this cause being tried at the York assizes. He submitted that the Court would not direct the cause to be tried in the County Court against the wish of all the parties.

SIR C. CRESSWELL: Although the parties may apply for a cause to be tried at the assizes, I may still consider it a proper one to send to the County Court. Before I make any order, an affidavit must be brought in, showing the amount of the deceased's personal property.

An affidavit having been subsequently brought in, from which it appeared that the personal property of the deceased amounted to £290, the Court directed the cause to be tried by an issue at the York assizes.

1860.

CRISPIN *v.* DOGLIONE, on opposed Motion.

February 8.

CRISPIN
v.
DOGLIONE.*Security for Costs.—Plaintiff Foreigner.—Tambisco v. Pacifico, 7 Ex. Rep. 816.*

The Court will not order the plaintiff to find security for costs when, though a foreigner, he is staying in England at the time of the application, and there is nothing to lead to the supposition that he is on the point of leaving the country. His affidavit in opposition to such an application need not state an intention of permanent residence.

In this case letters of administration of the estate of Henry Crispin, deceased, were, on the 6th of July, 1859, on an *ex parte* motion, granted to Francisco Jose Cortes Crispin (the plaintiff in this suit), as the natural and lawful son and sole person beneficially entitled to the estate of the deceased, limited to substantiate proceedings in Chancery in a bill filed by the said F. J. C. Crispin against Donna Maria Doglione and others. The issue of the said grant was stayed by the proceedings in this suit.

February 1.

Dr. Spinks, for the defendant, moved the Court to order the plaintiff to give security for costs. The plaintiff, on his own showing, is a foreigner living in Portugal, and is in this country merely for the purpose of carrying on this suit. (*Oliva v. Johnson*, 5 B. & Ald. 908; *Ainslie v. Sims*, 17 Beav. 57.)

Dr. Phillimore, Q.C., contra: Crispin in his affidavit states that he came to England in May, 1859, to institute a suit in Chancery against the defendant in respect of the personal estate in this country of Henry Crispin, deceased; that he was advised that a personal representative of the deceased would be a necessary party to such suit, and that his application to this Court for that purpose gave rise to the present proceedings. He further swears that he is a necessary witness in both suits, and intends to remain in this country till they have been respectively determined. Under such circumstances *Tambisco v. Pacifico*, 7 Ex. Rep. 816, is an authority for rejecting the present application. It is there said, "It is requisite the plaintiff should state in his affidavit that he is resident in this country, to prevent a stay of proceedings until he shall give a

"security for costs; the plaintiff's affidavit does state that; "it is suggested that he ought to go further, and to state that "he intends to take up his permanent residence here, but "such a statement would be of very little avail, for he might "change the intention the moment judgment was given. The "fact of his being actually here is the true criterion by which "the question is to be settled."

Cur. adv. vult.

1860.
February 8.
CRISPIN
v.
DOGLIONE.

SIR C. CRESSWELL: This was a question as to security for costs. The case in the Exchequer which was cited, and in which all the former cases were reviewed, comes to this, that where the party is in England, and there is no reason to suppose that he is on the point of going away, no order will be made for security for costs; and this seems to be recognized in the Queen's Bench. If he does go abroad you may stop the proceedings till security is given.

Motion rejected.

February 8.

In the Goods of JANE PARKER (deceased), on Motion.

February 8.

Will.—Death of Devisee before Testator.—Child or other Issue.—1 Vict. c. 26, s. 33.

In the Goods of
JANE PARKER.

To prevent the lapse of a legacy to a legatee, being a child or other issue, who may die in the lifetime of the testator, it is not necessary that the issue of the legatee who is alive at the death of the testator should be the same issue who was alive at the death of the legatee; it is sufficient that any issue—*e. g.* a grandchild of the legatee—should be in existence at the death of the testator. Such a legacy is a vested interest in the legatee, and passes to his representatives or under his will, as the case may be, and not to the issue, whose existence prevents the lapse.

Jane Parker, widow, by her will, dated the 4th of December, 1851, left all the real and personal property to which she might be entitled at the time of her death to her daughter, Jane Mary Head, to her separate use, free from marital control, and appointed her sole executrix. Mrs. Head, the sole legatee and executrix named in the above will, died on the 25th of February, 1855, a widow and intestate, and

1860. in the testatrix's lifetime. She left surviving her an only
February 8. child, Augusta, who married a Mr. Imeson, and died on
the 7th of June, 1859, in the testatrix's lifetime, leaving
In the Goods of her husband and an only child, Emily Augusta, her sur-
JANE PARKER. viving. Jane Parker, the testatrix, died the 24th of Decem-
ber, 1859. On the 11th of January, 1860, administration of
the effects of Augusta Imeson was granted to her husband,
who subsequently took administration of the effects of Jane
Mary Head. Emily Augusta Imeson was an infant under one
year of age, and the question now was whether Mr. Imeson
was entitled to the administration with the will annexed of
Jane Parker, as the representative of the beneficial legatee
in the will, or as guardian to his infant daughter, the next of
kin of Jane Parker at the time of her death. The difficulty
felt in the registry was on the 33rd section of 1 Vict. c. 26, by
which it is enacted that "where any person, being a child or
"other issue of the testator to whom any real or personal es-
"tate shall be devised or bequeathed for any estate or interest
"not determinable at or before the death of such person, shall
"die in the lifetime of the testator leaving issue, and any
"such issue of such person shall be living at the time of the
"death of the testator, such devise or bequest shall not lapse,
"but shall take effect as if the death of such person had hap-
"pened immediately after the death of the testator, unless a
"contrary intention shall appear by the will."

Dr. Phillimore, Q.C., submitted that the words of the sec-
tion were sufficient to extend to grandchildren and great-
grandchildren, that the legacy had not lapsed, and that Mr. Ime-
son was entitled as the representative of the beneficial legatee.

SIR C. CRESSWELL: I agree with you on that construction
of the section; it is consistent with the case of *Johnson v.*
Johnson, 3 Hare, 157, decided by Wigram, V.C. A doubt
might be raised on the words, "leaving issue, and any
"such issue of such person shall be living at the time
"of the death of the testator." In this case the issue of the
legatee who was alive at the time of the death of the testator
is not the same issue who was in existence when the legatee
died; but I think it a fair presumption that the intention of

the Act was to preserve the legacy whenever there might be any issue of the legatee alive at the death of the testator; and I see nothing in the wording of the section to exclude this construction. In another case on this section (*Winter v. Jane Parker*, 5 Hare, 312-13) there are some remarks of Wigram, V.C., which seem to warrant a liberal construction of this remedial provision of the statute. *Johnson v. Johnson* also decided that the section of the Wills Act to which you have referred does not substitute for the predeceased devisee or legatee the issue whose existence is the event or condition which excludes the lapse, but renders the subject of the gift the absolute property of the predeceased devisee or legatee. I am of opinion that the words do extend to all issue, so as to exclude a lapse, but the property remains in the beneficial legatee. Mr. Imeson is therefore entitled as his wife's representative, and not as guardian to his infant child, to the grant prayed.

1860.
February 8.
In the Goods of
JANE PARKER.

Motion granted.

In the Goods of THOMAS HENRY OLIPHANT (deceased), on Motion.

Universal Legatee.—Administration or Probate—20 & 21 Vict. c. 77, s. 39.

February 15.
In the Goods of
THOMAS
HENRY
OLIPHANT.

The universal legatee of a testamentary paper is entitled to administration with the will annexed, but not to probate. No trace of any different practice can be found in the registry.

SEMBLE: the 29th sect. of 20 & 21 Vict. c. 77, relates to the procedure of the Court, not to the principles on which it is to act.

In this case the deceased left a will in the following terms :—“This the last will and testament of me, Thos. Henry Oliphant, of No. 23, Marine Parade, Dover, Kent, made the 27th day of April, 1853. I leave all the property and effects “possessed by me at the time of my decease, to my dear wife.”

Dr. Spinks moved the Court to decree probate of the above paper to Mrs. Oliphant, as executrix according to the tenor. The practice of the registry undoubtedly has been in such

February 1.

1860. cases to grant administration, with the will annexed, to the
 February 15. person beneficially entitled as universal legatee; but if, on
 In the Goods of considering the principle of such grants, and the authority of
 THOMAS text writers, the Court should be of opinion that the practice
 HENRY is wrong, it will not feel itself bound by it. A testament in
 OLIPHANT. the old books signified a will in which executors were ap-
 pointed, and dying intestate meant dying without appointment
 of executors; but the appointment may be express or implied:
 see Williams on Executors, p. 196, 4th edit., the passages of
 Swinburne and Godolphin there referred to, and *Androvin v.*
Poiblanç, 3 Atk. 301, where Lord Hardwicke said that a per-
 son named "universal heir" in a will would have a right to go
 to the Ecclesiastical Court for the probate. Mrs. Oliphant is
 in effect constituted universal heir by the will. She must take
 with all the rights and liabilities of an executor.

SIR C. CRESSWELL: The 29th section of the Probate Act
 directs "that the practice of the Court of Probate shall, ex-
 cept where otherwise provided by this Act, or by the rules
 or orders to be from time to time made under this Act, be,
 so far as the circumstances of the case will admit, according
 to the present practice in the Prerogative Court." I think
 this applies to procedure only. If it is applied to principles, it
 would be conclusive against your application, for you admit
 that the practice in the registry is against you. However, I must
 take time to consider the matter, and will direct the cases in
 the registry to be looked up, to ascertain the antiquity of the
 present practice. *Cur. adv. vult.*

February 15. SIR C. CRESSWELL: In this case I was asked to overthrow
 the practice which has prevailed for a long time in the regis-
 try, and so admitted by counsel. I have caused inquiry to
 be made, and no trace can be found of any time when the
 practice was otherwise. If I could have found that within
 any reasonable time the practice had been different, and no
 solid reason for the change, I should have been willing to
 revert to the older practice. I have looked at the case in
 3 Atk., and I think Lord Hardwicke proceeded there on
 grounds not applicable to the circumstances of the present
 case. There the contest was between persons designated as

universal heirs, and an executor appointed with respect to a lapsed legacy; and Lord Hardwicke held that "universal heir" was the proper term for persons intended to represent the testator, observing that the word "executor" is a barbarous word of modern law. He thought, therefore, that the term "universal heir" would entitle the parties to probate. In the present case Mrs. Oliphant is universal legatee, and must take administration with the will annexed in that character.

1860.

February 15.

In the Goods of
THOMAS
HENRY
OLIPHANT.

PEGG V. CHAMBERLAIN AND OTHERS.

February 15.

PEGG

v.
CHAMBERLAIN
AND OTHERS.

Administration.—Practice.—Limited Grants to Cestuis que trusts.—Consent.

The Court will grant letters of administration to a *cestui que trust* of a trust-fund, limited to that fund, when the trustee in whose name the fund stands is dead and is without a personal representative, the parties entitled to represent the deceased trustee having been first cited. When there are several parties interested in the fund, the grant will be limited to the interest of the *cestui que trust* making the application, unless the other *cestuis que trusts* assent to the grant extending to their respective interests.

Margaret Pegg died in 1839, leaving a will, whereof she appointed Henry Pegg (her son) and Mary Chamberlain executors, and whereby she bequeathed £400 to her said executors upon trust, to pay the dividends thereof to Mrs. Hollidge for life, and after her death she gave the said principal sum to be divided equally between her three grandchildren, Mary West, Joseph Pegg, and Henry Pegg. The will was proved by both the executors, and the £400 was afterwards invested in their names in £396. 18s. 5d. Three per Cents.

Mary Chamberlain, having survived her co-executor, died in 1849, a widow and intestate, leaving her surviving five children her sole next of kin, and the only persons entitled in distribution in case of her intestacy. Letters of administration had not been taken out to the effects of Mary Chamberlain.

Dr. Tristram moved for a grant of letters of administration

1860. to the personal estate of Mary Chamberlain, limited to the
 February 15. said sum of £396. 18s. 5d. New Three per Cents., and to the
 PEGG dividends due thereon, to Henry Pegg, the grandson, as a
 v. party entitled to one-third of the said fund. The five next of
 CHAMBERLAIN kin of Mary Chamberlain had been duly cited.
 AND OTHERS.

SIR C. CRESSWELL: It does not appear that you have the assent of the other parties who are entitled to the fund. You should get the consent of the other *cestuis que trusts* to the grant. If you do not, according to the practice, as I am informed, of the Prerogative Court, the grant should be limited to Henry Pegg's share of the fund.

February 15.

MARSH AND OTHERS v. MARSH AND OTHERS.

MARSH AND
 OTHERS
 v.
 MARSH AND
 OTHERS.

Will.—Codicils.—Presumption as to what Papers form part of a duly executed Will.—General revocatory Clause of all former Wills.—Effect of Annexation of Codicil to former Wills revoked.—1 Vict. c. 26, s. 22.—Costs.—Omission from Probate of opprobrious Terms.

When several sheets of paper, constituting a connected but not in all points a consistent disposal of the property, are found together, the last sheet being duly executed, the presumption, in the absence of direct proof, is, that they all formed the will of the deceased at the time of execution. A general revocatory clause of "all former wills" leads to the inference that the deceased at that time intended to leave a subsisting will.

The physical annexation (by a piece of tape, *e.g.*) of a duly executed codicil of later date to testamentary papers, duly executed but revoked, is no ground for inferring the "intention to revive," required by 1 Vict. c. 26, s. 22.

SEMBLE: Such intention can only be shown by the contents of the codicil itself.

In this case the testator, James Stamford Caldwell, died a bachelor on the 17th of November, 1858. He had had three sisters, married respectively to W. S. Roscoe, Esq., A. C. Marsh, Esq., and Sir Henry Holland. Mrs. Roscoe and Lady Holland died before the testator; Mrs. Marsh, who had several

daughters but no son, survived him, and as coheir was one of the defendants.

Twenty-seven executed wills and codicils were found after Mr. Caldwell's death, besides a large number of incomplete testamentary papers; Eliza Louisa Marsh, Georgiana Amelia Marsh, and Rosamond Jane Marsh, as executrices, propounded a will bearing date the 19th of May, 1856; a codicil of the 18th of June, 1856; and a codicil of the 29th of April, 1858.

The will of 1856 consisted of seventeen pages, and was written on paper of three different sizes, loosely tied together. The first three pages and the last of the two concluding sheets were in the testator's handwriting; ten of the intermediate pages were parts of a will prepared in duplicate by the testator's solicitor in 1854; and the three remaining sheets were part of a draft will prepared by another solicitor, under the testator's instructions, in 1856. Of this document the two last sheets were executed and attested, being dated respectively the 22nd of March and the 19th of May, 1856. The last sheet contained a general revocation of all former wills. The codicil of 1856 is sufficiently noticed in the judgment. The codicil of the 29th of April, 1858, was wholly in the testator's handwriting; it was found, as more particularly described in the judgment, annexed by a tape to a will of 1851 and a codicil of 1852; and the only important point in respect thereof raised and determined was the effect of the annexation, in reviving the testamentary papers to which it was found annexed.

Dr. Deane, Q.C., and Mr. Dowdeswell, for the plaintiffs.

Mr. Serjt. Pigott and Dr. Wambey; Dr. Spinks, Mr. Hannen, and Mr. Osler; Dr. Phillimore, Q.C., Mr. A. Hobhouse, and Mr. J. D. Coleridge, for defendants and parties cited.

SIR C. CRESSWELL: After stating the nature of the suit, said, several parties pleaded separately, and in the result the following issues were raised: Whether the writings propounded were and contained the last will and codicils of the deceased; whether they were duly executed; whether the sheets other than the last sheet of the will, dated the 19th of May, 1856, were annexed to or formed, together with that sheet, the last will of deceased

1860.
January 18 &
February 15.

MARSH AND
OTHERS
v.
MARSH AND
OTHERS.

1860.
January 18 &
February 15.

MARSH AND
OTHERS
v.
MARSH AND
OTHERS.

at the time of the execution of such last sheet. Similar questions as to the codicils. Whether the last sheet was duly executed, and intended by itself to be a will, or codicil, or testamentary paper revocatory; whether the word "her" was written "his" at the time of the execution of the second codicil; whether the interlineation "situated in the counties of Stafford and Chester," in the same codicil, was written before execution; whether a paper writing, bearing date the 1st of March, 1851, was executed as a last will of the deceased, and a paper writing of the 31st of January, 1852, was executed as a codicil thereto; whether deceased by the codicil of the 29th of April, 1858, intended to revive the will of the 1st of March, 1851, and the codicil of the 31st of January, 1852. First, the plaintiffs proved that in 1856 the testator executed a paper as a will—it was indeed twice executed, on 22nd of March, and again on the 19th of May; the forms required by the statute were complied with on each occasion; the very paper signed and attested was therefore a will. The next question to be considered is, secondly, what did that will so signed consist of? Take the case as it would have stood on the first execution. Where a will is found written on several sheets, and the last only is signed and attested, although the witnesses did not observe the others, the *primâ facie* presumption is, that they were in the room, and formed part of the will at the time of the execution: (*Gregory v. Queen's Proctor*, 4 N. C. 620.) Is there anything to confirm or rebut that presumption? The last page of the will as originally executed on the 22nd of March, 1856, which was written on the second page of a half-sheet of paper, began with these words "aforesaid trust, or in relation thereto," which were manifestly the conclusion of the sentence which had been commenced on the preceding page; it then proceeded: "And lastly, I do hereby nominate and appoint my nieces Eliza Louisa Marsh, Georgiana Amelia Marsh, and Rosamond Jane Marsh, executrices of this my last will and testament, and I do hereby revoke all former and other wills and codicils by me at any time heretofore made, and declare this to be my last will and testament: in witness," etc. The last page therefore of the will, as executed on the first occasion, began with a few words which completed a sentence commenced on the preceding page, and which must have been

there at the time, being on the same sheet ; but that and the eight preceding pages were part of a will prepared for the testator by his solicitor, Mr. Keary, in 1854, and no one page could be separated from the others without leaving the sense imperfect ; it is therefore reasonable to infer that the whole were there, so as to make sense. The last page of the will as re-executed began with the same words as before, completing a sentence, and was a copy of the last page as it stood when executed for the first time, except the omission of one of the executrixes ; there can be no reasonable doubt, therefore, that the last page of the will as before executed was there ; if so, the preceding page must have been there ; and if the nine preceding pages were there when it was executed the first time, what reason is there for supposing that any of them were afterwards disannexed ? Continuing the examination of the contents of the will backwards, it is found that these clauses prepared by Mr. Keary are preceded by some clauses relating to personal property contained in three pages, which had been prepared at the request of the deceased by a solicitor, Mr. Ward. Mr. Ward sent them to him on the 21st of March, 1856 ; the will was executed for the first time on the 22nd ; the first presumption is therefore fortified by the probability that Mr. Caldwell, desiring to make a new will, waited until he received those clauses, and when he had received them added them to the will before it was executed on the 22nd of March. If those clauses were annexed to those prepared by Mr. Keary before the execution on the 22nd of March, there is nothing to raise a presumption that they were afterwards disannexed. The remainder of the will consisted of three sheets, all in the handwriting of the testator, containing the disposition of his real estates, and those three sheets have manifestly been prepared at one and the same time. The will then consists of three portions : first, the formal commencement and disposition of real property ; secondly, the special clauses as to personal property ; thirdly, several provisions and trusts relating to the real and personal estate. It is true that some provisions in the third part are inconsistent with the first, but any one or two of the parts without the rest would be so manifestly imperfect, and the reasons for supposing that the whole were there are so much stronger than any contrary presumption.

1860.

January 18 &
February 15.

MARSH AND
OTHERS
v.
MARSH AND
OTHERS.

1860.
January 13 &
February 15.

MARSH AND
OTHERS
v.

MARSH AND
OTHERS.

arising out of the inconsistency of some parts, that I have arrived at the conclusion of fact, that all the sheets now forming part of the will of the 19th of May, 1856, did so at that time. Dr. Spinks likened it to the case of alterations; but that differs from the present, for there the Court has evidence before it that the will was originally in a different form from that produced. The argument that the last sheet on which the execution on the 19th of May was written was intended to be a perfect instrument by itself, simply revoking all wills, is, I think, disposed of not only by the reasons already given, but by the appointment of executors, which would have been useless had he intended simply to revoke all wills; and by the expression, "revoke all former wills and all codicils thereto," which imports that the instrument then about to be executed was to have operation as a testamentary disposition of his property, and not merely as causing him to die intestate. Thus far, I think, two points are established; that on the 19th of May a will was executed by deceased consisting of the several sheets of paper found attached together after his decease, and that all former wills were by that instrument revoked. After that a codicil was executed on the 18th of June, which was only assailed by the argument that the codicil of the 29th of April, 1858, revived a will of the 1st of March, 1851, and had the effect of revoking all other testamentary papers. It seems to recognize the will of 1856 by referring to the revocatory clause. The deceased had made a will in 1854, and a codicil in 1855, by which he devised a cottage at Wood-lane to Mary Beardmore for life; that was revoked by the will of May, 1856; the codicil in June excepts "from the revocation of my former will or "codicil thereto, all mention of a cottage and garden to my "housekeeper, Mary Beardmore, which is to have full force "and effect;" this codicil again appointed his three nieces, Eliza Louisa, Georgina Amelia, and Rosamond Jane Marsh, his executrixes, one of whom had been omitted when the will of 1856 was re-executed on the 19th of May. The next instrument propounded by the executrixes is a codicil bearing date April 29th, 1858, which was found attached by a piece of tape to a will made in 1851. The execution of the codicil, as required by the statute 1 Vict. c. 27, was proved, and there was not any evidence to rebut the *prima facie* presumption that the whole of

it was there at the time; on the contrary, the evidence of the attesting witnesses, although not very clear and precise, supported and confirmed that presumption. The important question remains, as to the effect and operation of this codicil, under the following circumstances. After the testator's death, at his residence, Linley Wood, a search was made for his will, and in a cupboard in his dressing-room was found a leather case, not locked, but tied round with tape. It contained a great many testamentary papers, and, amongst others, the will of 1856, the codicil of 1856, the codicil of 1852, and the will of 1851, with the last codicil of the 29th of April, 1858, attached to it by a piece of tape at the upper corner on the left hand; other testamentary papers were found in the cupboard. It was argued that the testator, by attaching the codicil to the will of 1851, revived it; this depends on the construction of the statute, 1 Vict. c. 26, s. 22: "And be it further enacted that "no will or codicil, or any part thereof, which shall be in any "manner revoked, shall be revived otherwise than by a re-execution thereof, or by a codicil executed in manner hereinafter required, and showing an intention to revive the same." The codicil, therefore, must show the intention to revive. It may be assumed that a codicil to a will shows an intention that some will should be operative, and, *prima facie*, the last existing will, especially if that revoked all others, must be taken to be the will intended. If the testator had made only one, and had torn it *animo cancellandi*, a codicil "to his will" might revive it, but still it would be the contents of the new will which would show the intention. But can any act *dehors* the instrument be resorted to for the purpose of establishing the intention? I apprehend not; it would be such act, and not the codicil, then that showed it. It appears to have been the object of the legislature to put an end equally to implied revocations and implied revivals. The words of the section are plain, and I must act upon them. Again, if the annexation is to have any effect, when did it take place? There is no ground for presuming that it was before the codicil was executed; there was no natural connection between them, independently of the contents, to raise the presumption. If an act *dehors* the codicil may affect the question, must it not be done before or at the time? If it may be done after, why should

1860.

January 13 &
February 15.MARSH AND
OTHERSv.
MARSH AND
OTHERS.

1860.
January 18 &
February 15.

MARSH AND
OTHERS
v.
MARSH AND
OTHERS.

he not be allowed to shift it from one to another, and to make the codicil revive, first one will and then another, according to the fancy of the moment? That cannot be the meaning of the section. But counsel, feeling the great difficulty of contending that the act of annexation would affect the question, endeavoured to maintain that the contents of the codicil showed an intention to revive the will of 1851. In order to ascertain the value of that argument, let us see what were the provisions of the several wills to which it applies. By the will of 1856 all landed and real property was at the commencement given to trustees, to pay all rents, etc., to the use of Ann Marsh for life, and remainder to her daughters, etc. And it contained a direction that Ann Marsh, and every person under the will becoming entitled to Linley Wood and other real property by the will devised, shall assume the name of Caldwell. The property in and near Derby was afterwards given to his nephew, W. C. Roscoe, for life, etc. By the codicil of 1858 the person possessed of Linley Wood was to have the interest of his personal property, after the investment of £8,000 in land, which was "to be settled expressly to follow the same directions and provisions as to any landed and real property devised by my last will." What will does he mean? Any will theretofore made, or any will thereafter to be made, or any disposition by that codicil made? The codicil contained the following disposition of the real property:—"I will and direct that Linley Wood, with its appurtenances, and all real estate and property, mines, lands, houses [situated in the counties of Stafford and Chester¹], shall upon my death go to my sister Ann Marsh for the term of her natural life, or so long as she shall remain unmarried, and in case of her death or marriage, then I will and declare that all such real estate in the counties of Stafford and Chester respectively shall go to such nieces as shall be unmarried at the time of my death, so long as such nieces shall continue unmarried (I mean the daughters of my sister Ann Marsh), and in case of the marriage of any such nieces, then to the survivors or survivor who may remain unmarried." This disposition by the codicil would, if read without the interlineations, give all realty to Ann Marsh for life, remainder as to land in Stafford and Chester to his nieces. The land in Derby

¹ These words appeared as an interlineation in the original.

is not mentioned. On the death of Mrs. Marsh, therefore, the property would be divided ; if the codicil is read with the interlineation it would be divided immediately. By the will of 1851 all real property in Stafford, Derby, or elsewhere is given to Ann Marsh for life, remainder all to nieces in succession, etc. By this will all would be left together. But it was argued that the codicil directing £8,000 to be invested in land, to be settled in the same manner as any landed real property devised by his will, could only be applicable to a will directing all his land to go in one channel ; but the codicil in the disposition of the real estate is quite inconsistent with the will of 1851 ; is the will of 1851 to supersede the codicil as to real estate for the purpose of avoiding the difficulty as to the investment of the £8,000 ? Again, in the will of 1856 is a direction to invest £6,000 in land to be conveyed to the same uses as the real estates thereby devised. Now part of the estates, viz. the land in and near Derby, was thereby devised to Roscoe for life. The same difficulty existed in that will as to the investment of the £6,000, as in that will and the last codicil taken together as to the investment of £8,000 ; and I cannot from the alleged inconsistency, or rather from the difficulty, of saying how the land to be purchased must be settled, infer that he could not intend the codicil to apply to that will. It looks to me like a recognition of the direction in that will to invest money in land, and only increasing the sum from £6,000 to £8,000, and I cannot find in the codicil any intention to revive the will of 1851. Upon the whole, then, I am of opinion that the will of the 19th of May, 1856, and the codicils of June, 1856, and April, 1858, were duly executed ; that they contained the last will and codicils of the deceased, and that the devise to Mary Beardmore in a codicil of the 3rd of July, 1855, revoked by the will of 1856, was revived by the codicil of 1856 ; that all the sheets forming the will as propounded formed, together with the last sheet, the will of the deceased at the time when it was executed ; that the last sheet of the will of 1856 was not intended to be a testamentary paper by itself revoking all wills ; that the word appearing " her " in the ninth line of the twelfth page of the codicil of 1858 was written " his " at the time when that codicil was executed ; that the interlineation " situate in the " counties of Stafford and Chester " was not made before the

1860.

January 13 &
February 15.MARSH AND
OTHERS
v.
MARSH AND
OTHERS.

1860. codicil was executed ; that the paper writing bearing date the
 January 13 & 1st of March, 1851, was executed as the last will of the de-
 February 15. ceased, and that the paper writing of the 31st of May, 1852,
 MARSH AND was executed as a codicil thereto ; that the deceased did not
 OTHERS by the codicil of the 29th of April, 1858, intend to revive the
 v. will of the 1st of March, 1851, and codicil of the 31st of May,
 MARSH AND 1852. Costs of all parties out of the estate.
 OTHERS.

Mr. Serjt. Pigott prayed the Court to except from probate certain expressions in the last codicil derogatory to the Roscoe family.

The Court expressed a doubt whether the words were of such a character as to warrant the application, and suggested that it might lead to inconvenience as a precedent ; but, on consent of counsel for the plaintiffs, made the order as prayed.

March 14. In the Goods of HENRY HARRIS (deceased), on Motion.
 In the Goods of HENRY HARRIS. *Will.—Appointment of Executor.—Unexecuted Obliteration and Substitution.—No Revocation.*

Where an appointment of an executor is made in a duly executed will, and the testator, having expressed his intention of so doing, obliterates the original name and substitutes another, such obliteration and substitution being unexecuted, the Court will direct the original name to be restored in the probate, if it is satisfied by evidence *aliunde* what the original name was.

The testator in this case died on the 15th of January, 1860, leaving a will, dated the 11th of September, 1854, in which his wife was appointed residuary legatee for life. The will, when examined after the testator's death, contained an appointment of executor in the following words:—" I appoint *my brother, Edwin Harris, of Prospect Villa*, in the said *county of Gloucester*, sole executor of this my will." The words in italics being substituted for others erased and illegible on the face of the will. From the affidavits of the solicitor who prepared the will, and of his clerk, who were also the attesting witnesses, it appeared that, as drawn and executed,

the appointment of executor was in the following words:—
 “I appoint my friend, Joseph Moss, of Hampden Place, in
 “the said city of Gloucester, builder, sole executor of this
 “my will.”

1860.

March 14.

In the Goods of
 HENRY
 HARRIS.

The widow deposed that she was aware that her husband had made his will, and appointed Joseph Moss, of Hampden Place, in the city of Gloucester, executor thereof; that about two years before testator's death, his brother, Edwin Harris, came to reside near Gloucester, and that soon afterwards the testator expressed his intention of appointing his brother, E. Harris, executor of his will instead of Moss, and said that he should strike out the name of Moss, and substitute that of his brother, as he supposed he might do so, and it would make no difference to his will; that the testator shortly afterwards told her that he had done so. The deponent also spoke to the words (above) in italics as being in the handwriting of the testator.

Dr. Swabey now moved the Court to treat the obliteration of the words appointing Moss executor as a revocation under the 21st section of the Wills Act. The case seems hardly distinguishable from that of *In the Goods of Thomas Parr, deceased*, 6 Jur. N. S. 56, moved a few weeks since by Dr. Spinks, and in which the Court, on the authority of the Judicial Committee of the Privy Council in *Brooke v. Kent*, 3 Moore, 347, directed the obliterated names to be restored. In *Brooke v. Kent*, however, the words erased and substituted respectively indicated the amount of a legacy. Here the question was of the appointment and revocation of an executor; and *In the Goods of John Bedford, deceased*, 5 N. C. 188, Sir H. Jenner Fust, after the decision in *Brooke v. Kent* had been called to his notice, treated such an obliteration of an executor's name as a revocation. This case, it is believed, was not before the Court when the case of Thomas Parr was moved. In *Short d. Gastrell v. Smith*, 4 East, 419, on a special case arising out of an action for ejectment, it appears that the testator devised and bequeathed, etc., to John Spillman and Edward Aldridge in trust, etc.; he afterwards obliterated the name of John Spillman, and inserted two other names with that of Aldridge, such alteration not being

1860. executed according to the Statute of Frauds. It was argued
 March 14. that the revocation was effectual; and that the devise to one
 — was so different a matter from the original devise to two,
 In the Goods of as to amount to a revocation of the will in favour of the heir-
 HENRY at-law; but Lord Ellenborough delivered the opinion of the
 HARRIS. Court to the effect that there was no intention to revoke the
 devise to Spillman, except with the view to substitute the
 other devisees, which failing, the case was to be governed by
Onions v. Tyrer, 1 P. Wms. 343, and the name of the original
 devisee restored. If the Court considered the obliteration in
 the present case equivalent to a revocation, it would grant
 administration with the will annexed to the widow as residuary
 legatee for life.

SIR C. CRESSWELL: I hardly understand the grounds of
 Sir H. Jenner Fust's decision *In the Goods of Bedford*, but I
 think I am bound by the decision of the Judicial Committee,
 and must reject the present motion.

On the 4th of April, on the renunciation of Moss as exe-
 cutor, the Court granted administration with the will annexed
 to Mary Harris, as the relict and residuary legatee for life,
 restoring in the probate the obliterated words, and omitting
 the words substituted.

March 14. In the Goods of WILLIAM WATTS (deceased), on Motion.
 —
 In the Goods of *Administration de bonis non with Will annexed.—Substituted*
 WILLIAM *Legatee.—Limited Grant refused.*
 WATTS.

An application for a grant of administration *de bonis non* (with the
 will annexed) to a substituted universal legatee, limited to £750
 stock, in which she was solely interested, on an affidavit that the
 parties entitled to a general grant were more than nine in number,
 that their residences were widely apart, and that their service with
 a citation would be attended with great difficulty and expense, re-
 fused.

HELD, that the Court will not give a limited grant, except upon strong
 reason shown.

William Watts, by his will, bearing date the 2nd of No-

vember, 1846, gave and bequeathed to William Stevenson Humberstone and Thomas Thorold all his money in the stocks or public funds, in trust to pay the annual produce thereof to his wife, Mary Watts, for her life, and after her decease to transfer the principal and the dividends then due thereon to his niece, Mary Watts Burton, her executors, administrators, and assigns; and he appointed the said Mary Watts, William Stevenson Humberstone, and Thomas Thorold, executors of his said will. The will, after his death, was proved in the Prerogative Court of Canterbury by the three executors. At his decease there was standing in his name in the books of the Bank of England, £750 Three per Cent. Reduced Annuities. The probate of his will was duly registered at the Bank of England, and the names of the three executors placed on the said stock. Mary Watts having survived her co-executors, died a widow and intestate, leaving the said Mary Watts Burton (who was her own niece), the party who upon her death was entitled under the will to the said stock, her surviving. The will contained no bequest of the residue. There was an affidavit filed of these facts, wherein it was also stated that the next of kin of the testator, being his nephews and nieces, who were the parties entitled to a general grant, were more than nine in number; that their residences were widely dispersed; that it would be attended with great difficulty and expense to serve them with a citation; and that they had no interest in the fund in question.

1860.

March 14.

In the Goods of
WILLIAM
WATTS.

Dr. Waddilove moved the Court to decree a grant of letters of administration *de bonis non*, with the will annexed, of the said testator, limited to the said sum of £750 stock, to Mary Watts Burton, the substituted legatee named therein. He cited *In the Goods of Martha Steadman*, 2 Hagg. 59, and 1 Williams on Executors, 5th Ed. 455.

March 7.

SIR C. CRESSWELL: If you were to cite the next of kin, and they were not to appear, you would be entitled to a general *de bonis* grant. It is very inconvenient having divers representatives for different parts of the property.

Dr. Waddilove cited *In the Goods of Jenny Watson*, *ante*,

1860. 110, where the Court had made a limited grant to a legatee
March 14. without requiring the next of kin to be cited.

Cur. adv. vult.

In the Goods of
WILLIAM
WATTS.
March 14.

SIR C. CRESSWELL: In this case Dr. Waddilove moved for a limited grant to a substituted legatee named in the will, the residue being undisposed of by the will. The next of kin of the testator are entitled to a general grant; and if they were cited and were not to take it, the substituted legatee would then be entitled to it. It is perfectly true that *In the Goods of Jenny Watson* I directed the party making the application to cite the next of kin, or take the grant limited to the property disposed of by the will. But in that case, if I recollect rightly, the party was miserably poor. Upon inquiry, I find that in Mr. Coote's 'Common Form Practice of the Court of Probate,' only two cases are mentioned in which my predecessors have made similar grants. These grants are entirely exceptional, and should not be made unless some very strong reason be given. After consultation with the Registrar, I am of opinion that there is no sufficient cause why I should in this case depart from the general rule; and I therefore reject the motion.

Motion rejected.

March 14.

Re CHARLES AXFORD (deceased), on Motion.

Re CHARLES
AXFORD.

Will.—Blind Testator.—Proof of Knowledge of Contents of Will.—Limited Grant to Executor of the Party beneficially interested.

A. when blind made his will, having no property of his own, but being surviving trustee of a fund consisting of £1,105. 5s. stock, solely for the purpose of enabling B., to whom the reversion in the said trust-fund had been assigned, to receive the same. By the will he appointed B., his executors administrators and assigns, his sole executor. B. died in A.'s lifetime, having made a will whereof C., one of his executors, had taken probate. The Court being satisfied that A. knew and approved of the contents of his will when he executed it, granted probate of it to C., limited to the said trust-fund.

Charles Axford, the deceased in this case, died on the 15th

of October, 1859. He left no property of his own, but he had, as surviving trustee and executor under his father's will, a sum of £1,105. 5s. stock, which, subject to his life-interest therein, was limited to his children absolutely. They had in 1851 assigned their interest in the said fund to Mr. John Elworthy. The deceased had left a will, made when he was blind, dated the 16th of June, 1851, wherein he declared that, as he did not possess any property whatever to bequeath, the only cause of his making a will was to constitute John Elworthy to be his sole executor, in conformity to an undertaking made by himself and contained in a certain indenture, made between himself and others of his family and the said John Elworthy, and he thereby constituted the said John Elworthy his sole executor, in order to enable him to carry into effect the orders and directions (still remaining to be done) contained in the will of his (the testator's) father, John Axford, deceased. The testator, in order that the said John Elworthy might be able to receive for his own use, after his (the testator's) death, the said sum of £1,105. 5s., did thereby appoint and constitute him, the said John Elworthy, his executors administrators and assigns, irrevocably his entire and sole executor.

The said John Elworthy died in the lifetime of the said testator, having by his will appointed Emily Coisi and William Cutcliffe his executrix and executor. Probate of his will had been granted by the Prerogative Court of Canterbury, in 1851, to the said Emily Coisi, power being reserved to make the like grant to the other executor.

Affidavits of these facts having been brought in,

Dr. Tristram moved the Court to decree probate of the will of Charles Axford, deceased, to the said Emily Coisi. As the testator was blind when he executed the will, it was incumbent upon him to satisfy the Court that, at the time of the execution, he was aware of its contents. This was established by the affidavit of one of the attesting witnesses. It therefore only remained for the Court to determine to whom the grant should be made. He submitted that the words of the will were sufficient to entitle Mrs. Coisi to the grant. There was no reported case precisely in point.

1860.

March 14.

Re CHARLES
AXFORD.

1860. SIR C. CRESSWELL: I have inquired of the Registrar, and
 March 14. understand that such grants have been made. In this case
 the grant may go to Mrs. Coisi, limited to the £1,105. 5s.,
Re CHARLES the trust-fund in question. *Motion granted.*
AXFORD.

March 21. In the Goods of PETER MARSDEN (deceased), on Motion.
 In the Goods of PETER MARSDEN. *Paper not Testamentary on the face of it.—Evidence of Testamentary Intention.*

B. having been informed that he could not recover from the illness he then laboured under, expressed a wish that his wife should be in a position to receive, at his death, certain sums of money in two savings-banks, and signed, in the presence of witnesses, two orders on a savings-bank, to pay to his wife, at any time she might apply for the same, any money deposited. B. died on the following day. The Court granted administration, with the two orders as together containing the will of B. annexed, to his widow.

The deceased in this case was a gardener at Market Weighton, in Yorkshire. He died on the 19th of October, 1857, after an illness of some weeks. The day before his death, he was told by his medical attendant, Mr. Jefferson, that he could not recover, whereupon he informed Mr. Jefferson that he had some money in two banks, which he wished his wife to be in a position to receive at his death, and requested Mr. J. to draw up a document giving the money to his wife. Mr. Jefferson wrote out two documents upon separate pieces of paper, and read the contents over to the deceased, who thoroughly understood and approved thereof. The deceased executed them by putting his mark to them in the presence of two witnesses. The deceased knew at the time that he could not recover, and it was his intention that the papers should operate as his last will. The documents were in the following terms, upon which the question arose, whether they were testamentary in their nature:—

“ I request that any money I may have deposited in the
 “ Bakewell Savings-Bank may be paid to my wife, Catherine

" Marsden, at any time she may apply for the same. Witness 1860.
" my hand this 18th day of October, 1857. March 21.

" The mark of X PETER MARSDEN.

In the Goods of
PETER
MARSDEN.

" Signed in the presence of

" Richard Jefferson.

" The X mark of Dinah Lambert.

" It is my wish that any sum of money I may have depo-
" sited in the York Union Bank may be given up to my wife,
" Catherine Marsden, at any time she may apply for the
" same. " Witness my hand (as before)."

Dr. Middleton now moved the Court to grant adminis-
tration with these papers annexed, as containing the last
will and testament of the deceased. In *Jones v. Nicolay*,
2 Rob. 288, the following paper was propounded as a co-
diciL:—

" To Messrs. Cox and Co., London.

" Mhow, 24th June, 1844.

" Gentlemen,—At twelve days' sight please to pay to
" Messrs. Edmonds and Co., of Bombay, on account of
" Maria Lucretia Jones, the sum of four thousand pounds
" sterling.

" I remain, gentlemen, your obedient servant,

" EDMUND NICOLAY, late Captain H.M.'s 29th Regt.

" £4,000.

Witnesses { " J. G. Scott, Lieut. 22nd Regt., N.I.
" W. S. Jones, Lieut. 22nd Regt., N.I."

The allegation propounding this paper pleaded, amongst
other things, the illness of the deceased at the time the paper
was written, that he was aware his life was despaired of, and
dictated to W. S. Jones, the executor of his will, the above
paper. He died on the following day. The admission of the
allegation was opposed on behalf of the next of kin, but ad-
mitted by Sir H. Jenner Fust. The report of that case con-
cludes with these words:—"Lady Nicolay was assigned to
" give in her answers." Nothing further was done in the
suit. He submitted that this was a sufficient authority to
warrant the present motion.

SIR C. CRESSWELL: I cannot distinguish the circumstances

1860. of this case from the one cited. The widow is entitled to the
 March 21. grant as prayed. *Motion granted.*

March 21.

PRESANT AND PRESANT v. GOODWIN.

PRESANT AND
 PRESANT
 v.
 GOODWIN.

*Will.—Residuary Clause.—Failure of Mode of Application
 intended.—Construction.—Costs.*

B. made his will in 1830, directing, after payment of debts, etc., and legacies, "all my remaining property to be placed in proper securities and appropriated to the education of my sister C.'s children, "as shall seem most meet and beneficial to them, by the executors "of this my will, recommending to them that the boys receive a "classical education to fit them for the learned professions, and the "girls to fit them for the purpose of teaching in respectable private "families, or in schools of the first respectability." B. died in 1859, having survived his executors, leaving a brother and three sisters his only next of kin, and children of his sister C., all grown up, surviving him.

On a question as to administration with the will annexed, the Court held that C.'s children were entitled as beneficial residuary legatees, but gave the defendant, one of the next of kin, costs out of the estate.

This was a question whether, on the construction of the will of John Gogill Leath, the plaintiffs were entitled to the administration with the will annexed as residuary legatees, under the following circumstances:—

The will, in the deceased's handwriting, bore date the 2nd of July, 1830, and was in the following words:—

"By the grace of God, being at the present time in sound
 "intellect and judgment, I do hereby make this my last will
 "and testament, in manner and form following; that is to
 "say, first, it is my desire that all my just debts be settled
 "and paid; secondly, that my funeral be conducted with
 "decency and economy, according to the usual customs ob-
 "served on such occasions; thirdly, that my just debts and
 "demands against me being paid and duly settled, it is my
 "will and desire that all my remaining property, after the

" hereinafter mentioned legacies, be placed in proper securi-
 " ties, and appropriated to the education of my sister Juliana,
 " the wife of Charles Presant's, children, as shall seem most
 " meet and beneficial to them, by the executor and executrix
 " of this my will, recommending to them that the boys re-
 " ceive a classical education to fit them for the learned pro-
 " fessions, and the girls to fit them for the purpose of teaching
 " in respectable private families, or in schools of the first re-
 " spectability ; fourthly, I give to my dear and beloved wife,
 " Harriet, the sum of three hundred pounds sterling for her
 " immediate use, besides what she is entitled to by our mar-
 " riage-settlement and other legal claims, and I give to her
 " for her sole use and benefit, all my plate, books, and all
 " other articles of furniture, jewels, and effects of which I
 " die possessed, and at her the said Harriet my beloved wife's
 " death, I give £5,000, now standing in the Three per Cent.
 " Consols in the names of Sir James Cockburn, Bart., and
 " Thomas Amyott, joint trustees of the above sum, as per
 " our marriage-settlement, to my sister Juliana, the wife of
 " Charles Presant, to be secured in the hands of trustees ap-
 " pointed by my executor and executrix, for her sole use and
 " benefit during the term of her natural life, the interest to
 " be paid to her quarterly, and to be at her own disposal, un-
 " influenced by her husband, and at her decease to be divided
 " amongst her children after they arrive at the age of twenty-
 " five, with the exception that one thousand out of the above
 " sum in the Three per Cent. Consols is to be at the disposal
 " by will of my dear and beloved wife, Harriet, who, if she
 " may require it sooner for her own use and benefit, may
 " appropriate it, by selling out of the above £5,000 in the
 " Three per Cent. Consol funds ; and I entreat her, as I am
 " assured she will, to give her friendly advice and assistance to
 " my said sister Juliana and her children, as she deems fit
 " for them ; fifthly, I appoint my said dearly beloved wife and
 " John Leath, Esq., of Surrey Square, and Thomas Amyott,
 " Esq., of the Colonial Register Office, executrix and executors
 " of this my last will and testament.

1860.

March 21.

PRESANT AND
 PRESANT
 v.
 GOODWIN.

" JOHN GOGILL LEATH.

" July 2, 1830, at the time principal medical officer at
 " Honduras."

1860. By a codicil dated July 3, 1830, he left £400 additional to
 March 14 & 21. be paid to his wife as soon as possible after his decease.

PRESANT AND
 PRESANT
 v.
 GOODWIN.

The testator survived his wife and the other executors named in the will, and died at Notting Hill Square on the 21st of October, 1859. An *ex parte* application to the Court for a grant of administration, with the will annexed, to Charles and Elizabeth Presant, as two of the residuary legatees named in the will, was made and rejected in November last, unless the consent of all the parties interested in the residue, if undisposed of by the will, could be produced and filed in the registry. The next of kin of the testator were his brother and three sisters, of whom Juliana Presant was one. Mrs. Goodwin, another of the sisters, refused her consent to the above grant.

The facts as above stated were in substance admitted by the declaration and plea, or by counsel at the hearing, when it was also admitted that the children of Juliana Presant, two sons and three daughters, were grown up and beyond the age of what is ordinarily understood by education.

The question of construction, as to the residuary clause, was argued by

March 14.

Dr. Spinks and *Mr. Martindale* for the plaintiffs, who contended that the words amounted to a gift of the residue, and a continuing gift of the residue, to take effect, notwithstanding the parties had grown to manhood before the testator's death, and the particular purpose for which he had intended the benefit had failed. They cited 1 Roper on Legacies, 646, 4th edit.; *Barlow v. Grant*, 1 Vern. 255; *Nevill v. Nevill*, 2 Vern. 431; *Barton v. Cooke*, 5 Ves. 462; *Leighton v. Bailey*, 3 Myl. & K. 267; *Hammond v. Neane*, 1 Swan. 35; *Leech v. Kilmorey*, 1 Turn. & Russ. 207; *Webb v. Kelly*, 9 Sim. 469; *Lockhart v. Hardy*, 9 Beav. 349; *Youngehusband v. Gisborne*, 1 Coll. 400; *Gough v. Bult*, 16 Sim. 45; *Lewes v. Lewes*, 16 Sim. 266; *Lord Lonsdale v. Countess of Berchtolet*, 3 Kay & J. 185.

Dr. Swabey and *Mr. G. L. Russell*, for the defendant, one of the next of kin, contended that there was no gift of the residue to any persons named, but only a direction to the

executors as to its mode of application, and that only for a limited time. The cases cited, with the exception of *Leighton v. Bailey*, were cases in which specific legacies were dealt with by the testator. In the only case which was a direct authority as to a residuary clause, viz. *Leighton v. Bailey*, there was a direct gift in these words: "I think there will be something left, after all funeral expenses, etc., being paid, to give to Willie Bailey, now at school, towards equipping him to any profession he may hereafter be appointed to." They cited *Cowper v. Mantell*, 22 Beav. 231. *Cur. adv. vult.*

1860.

March 21.

PRESANT AND
PRESANT
v.
GOODWIN.

SIR C. CRESSWELL: In this case two questions were raised, viz.: whether John Gogill Leath, deceased, by his will disposed of the residue of his personal estate; and whether the plaintiffs were two of the residuary legatees. The clause of the testator's will on which these questions depend is in these words: "That my just debts and demands against me having been paid and duly settled, it is my will and desire that all my remaining property, after the hereinafter mentioned legacies, be placed in proper securities, and appropriated to the education of my sister, Juliana, the wife of Charles Presant's, children, as shall seem most beneficial to them, by the executor and executrix of this my will, recommending to them that the boys receive a classical education to fit them for the learned professions, and the girls to fit them for the purpose of teaching in respectable families or in schools of the first respectability." In the course of a learned argument, the attention of the Court was directed to a long series of decisions, which I have examined, and they appear to me to establish both the points contended for by the plaintiffs. By the words, "all my remaining property," it is manifest that the testator intended to deal in some manner with the whole of his residuary estate; he directs it to be placed in proper securities and appropriated to the education of his sister's children; not that a sufficient portion, or so much as his executors should think necessary, should be so appropriated, but "all his remaining property." It was argued for the defendant, that the words of recommendation show that the gift was only during minority. But there are many difficulties in the way of such a construction. Is the gift to

March 21.

1860.
March 21.
—
PRESANT AND
PRESANT
v.
GOODWIN.

last during minority, although the education of the child may have ceased before ; or is it to expire at the age of twenty-one, although the education be not then finished ? I cannot read the words of recommendation as at all limiting and narrowing the operation of the preceding words. Another argument for the defendant was, that the gift in this will is not to the children of the testator's sister, but to the executors, to be appropriated by them. Many of the cases cited were of that description, and no such distinction appears to have been thought of. In *Barton v. Cooke*, 5 Ves. 461, the executors were to pay £100 for the board and education of James Barton, and a further sum of £100 with him as an apprentice fee ; and the Master of the Rolls considered that it was governed by *Barlow v. Grant*, 1 Vern. 255, where the gift was to the child. *Lewes v. Lewes*, 16 Sim. 266, and *Noel v. Jones*, ib. 309, were cases of the same description. Those arguments failing, the case rests upon the general rule, too firmly established by a series of decisions to be now drawn in question, that if a legacy is given for the benefit of an infant in one way, and it cannot be so applied, it may be applied for his benefit in another way. According to Shadwell, V.C., in *Lewes v. Lewes*, the words, "for the maintenance, clothing, and education," were, in that case, equivalent to "for the benefit of the child." In this case I cannot, notwithstanding Mr. Russell's ingenious argument, founded on Dr. Johnson's definition of the word "educate," put upon the words of this will a narrower construction. In *Rex v. Hall*, 1 B. & C. 136, Lord Tenterden, commenting upon the word "householder," for the meaning of which he had been referred to Johnson, said, "Now the meaning of particular words in Acts of Parliament, as well as other instruments, is to be found, not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object that is intended to be attained." I think the whole residue was given, and the whole was to be appropriated for the benefit of Mrs. Presant's children ; the plaintiffs are, therefore, two of the residuary legatees, and entitled to administration with the will annexed.

Dr. Swabey asked for defendant's costs to be paid out of

the estate. The Court refused to make this grant on motion, and it was a point of law arising out of the terms of the will itself.

1860.
March 21.

PRESANT AND
PRESANT
v.
GOODWIN.

SIR C. CRESSWELL: My rejection of the original motion merely gave your party an opportunity of opposing the grant if she should be so advised; however, the costs cannot be large, and I think in this case they may be paid out of the estate.

C A S E S

IN THE

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

1859. (Before the Full Court,—LORD CAMPBELL, C.J., WIGHTMAN, J., and
January 8. the JUDGE ORDINARY.)

M'KECHNIE
v.

M'KECHNIE v. M'KECHNIE.

M'KECHNIE. *Dissolution of Marriage. — Practice. — Proof of a Scotch
Marriage by Affidavit.*—20 & 21 Vict. c. 85, s. 46.

In a suit for the dissolution of a marriage which had been celebrated in Scotland, where the parties who could prove it resided, the Court made an order that the petitioner should be allowed to prove it at the hearing by affidavit. No appearance had been entered by the respondent or co-respondent.

This was a suit for the dissolution of a marriage, which had been celebrated in 1842 at Maypole, in the county of Ayr, in Scotland, promoted by the husband by reason of his wife's adultery. No appearance had been entered by the respondent or co-respondent. The Judge Ordinary had directed that the petition should be proved by oral evidence.

Mr. Macqueen now moved the Court, under section 46 of 20 & 21 Vict. c. 85, to order that the petitioner should be at liberty to prove the marriage by affidavits of the minister who solemnized it, and of the father and brother of the petitioner, who were present at its solemnization. They were all resident in Scotland. By section 46 of the Divorce Act, the Court had a discretionary power to allow cases to be proved

by affidavit. The marriage being merely a formal part of the petitioner's case, it would be a proper exercise of the Court's discretion to allow it in this instance to be so proved. The petitioner was a poor man, and the expense of bringing the witnesses from Scotland would fall heavily upon him. The adultery would be proved by oral evidence.

1859.
January 8.
M'KECHNIE
v.
M'KECHNIE.

LORD CAMPBELL, C.J.: Is the application opposed?

Mr. Macqueen: No; neither the respondent nor co-respondent have entered an appearance.

LORD CAMPBELL, C.J.: As there is no opposition, you may take the order.

(*Before the Full Court*,—WIGHTMAN, J., and WILLIAMS, J.; and the JUDGE ORDINARY.)

PALMER v. PALMER.

July 5.
PALMER
v.
PALMER.

Suit for Dissolution.—Previous Sentence in Foreign Court.—Marriage and Cohabitation subsequent to such Sentence.

B. and C., being domiciled English subjects, intermarried in 1848; in 1850, B., the husband, went to the United States, North America; in 1852, C. joined him in Philadelphia; in 1856, C. obtained a decree of divorce *à vinculo* there by reason of B.'s adultery; B. subsequently married and lived with the woman with whom that adultery was charged. C. returned to England in 1856, and petitioned for dissolution on the ground of B.'s adultery and cruelty. The only evidence of adultery given being proof of B.'s cohabitation, after the decree in Philadelphia, with the woman whom he married, the Court dismissed the petition.

This was a petition at the suit of the wife for dissolution of marriage by reason of adultery and cruelty, and bigamy and adultery.

No appearance was given for the respondent.

Dr. Spinks for the petitioner.

It appeared in evidence that the parties were married in

1859. England in November, 1848; Mr. Palmer was then assistant
July 5. to a surgeon at Congleton. After the marriage, they resided
at Lake, in Staffordshire; in April, 1850, Mr. Palmer went to
North America, his wife joined him there in 1852. In 1854,
they were residing in the house of a Mr. Haslam at Philadelphia, from whose evidence, taken by commission, and from that of his daughter, who was examined in Court, it appeared that Mr. Palmer treated his wife very brutally, and gave way to drink. At that time he was assistant to a wholesale druggist. In September, 1856, the marriage was dissolved at the suit of the wife by decree of the Court of Common Pleas in Philadelphia, by reason of Mr. Palmer's adultery with a Miss Grubb, whom he afterwards married, and with whom cohabitation, subsequent to such marriage, was proved. There was no evidence before the Court of acts of adultery previous to the decree of the Court of Philadelphia. Mrs. Palmer had returned to, and remained in, England since the end of 1856.

PALMER
v.
PALMER.

BY THE COURT: Are the parties domiciled in England or America now? You produce a decree of divorce *à vinculo* made in Philadelphia; apparently the parties were domiciled there at that time. Suppose the Court should be of opinion that he went to America with the view of obtaining a new domicile. Again, can a party who has obtained a sentence of divorce *à vinculo* in a foreign Court, come here and ask for a dissolution of marriage in consequence of what followed that sentence, namely, marriage and cohabitation? The lady instituted a suit for divorce in America, by which she caused her husband to be placed in the position of a single man; did she not connive at and encourage the second marriage?

Dr. Spinks: There is no proof of the domicile of origin having been abandoned; the presumption is in favour of its continuance; the *domicilium fori* in America would not be conclusive on that point. The sentence of a foreign Court would be inoperative to dissolve an English marriage; the subsequent cohabitation was therefore adulterous.

Cur. adv. vult.

WIGHTMAN, J., gave judgment: In this case, the husband

in 1850 went to America, and obtained a situation, and intended, as far as we can see, to remain there. In 1852, the petitioner went to Philadelphia, and renewed cohabitation with her husband. She alleged that while there he treated her with such cruelty as, coupled with adultery, would entitle her to a decree of dissolution. It appeared, however, that she instituted proceedings against him in an American Court, and obtained a decree of divorce *à vinculo*, and the respondent subsequently married another woman, with whom he still lives in America.

The adultery on which we are asked to found our decree in this case is the cohabitation of the respondent with that woman as his wife after the decree of the American Court.

The Court are, however, of opinion, that the petitioner is not entitled to treat the cohabitation with the woman whom he married, after the American decree, as adultery for the purpose of obtaining a sentence of dissolution of the marriage, and that, consequently, there was no proof of the adultery alleged. The petitioner is in this dilemma: either the American decree of divorce is valid, in which case the parties were at full liberty to marry again, and the respondent has not committed adultery by living with the woman he married; or the American decree cannot be recognized in this Court as valid; but, as it was obtained at her instance, she has no right to complain of the consequences which might naturally be expected to follow it. It might be said that she connived at the adultery of her husband; the petition must therefore be dismissed.

1859.

July 5.

PALMER

v.

PALMER.

(Before the Full Court,—WIGHTMAN and WILLIAMS, JJ., and the JUDGE ORDINARY.)

PELLEW v. PELLEW AND BERKELEY.

Petition for Dissolution.—Lapse of Time.

July 8.

PELLEW

v.

PELLEW AND
BERKELEY.

F. married in 1851. In 1853, he took the command of the squadron in China, but returned to Europe in the summer of 1854. In October his wife eloped with B. from Paris, with whom she had continued to

VOL. I. 2 P

1859.

July 8.

PELLEW

v.

PELLEW AND
BERKELEY.

live near Brussels. F. obtained a sentence of divorce *à mensd et thoro*, and steps were also taken to obtain a divorce bill, but discontinued, in consequence of F. being unable to bring an action for crim. con. against B., who remained abroad. F. now petitioned for a dissolution of the marriage :

Held, that there had been no such "unreasonable delay" in presenting the petition, as to raise a case for the discretion of the Court, under the 31st section of the Divorce Act.

This was a petition for dissolution of marriage, at the suit of the husband, Sir Fleetwood Pellew.

No appearance was given for the respondent or co-respondent.

The marriage took place at Brussels in 1851, and Sir Fleetwood and Lady Pellew lived together in England and abroad till 1853, when Sir Fleetwood was appointed to the command on the China station. Lady Pellew remained with her mother at Brussels. He returned in 1854, and rejoined his wife, but in October of that year she went off with the co-respondent from Paris, and wrote to her husband to the effect that her passion for Captain Berkeley was unconquerable and that she could no longer contribute to his (Sir Fleetwood's) happiness, by remaining with him as his wife. In December, 1854, Sir F. Pellew obtained a sentence of divorce *à mensd et thoro*, and it appeared that the respondent and co-respondent had since lived together near Brussels, and had two sons, the issue of their cohabitation. Steps were subsequently taken to obtain a Divorce Bill, but as Captain Berkeley remained abroad, and no action for crim. con. could be brought, it was not thought prudent to continue those proceedings. The present suit was called for by the position of the Exmouth peerage.

Dr. Deane, Q.C., and *Dr. Swabey*, conducted the petitioner's case.

WIGHTMAN, J.: The Court are of opinion that the petitioner is entitled to the relief prayed. The only consideration that suggested itself was, whether there had been unreasonable delay. So far as proceedings in this Court are concerned, there certainly has been no unreasonable delay. It appears that in 1854 Sir Fleetwood did take steps with a view to the introduction of a Bill in the House of Lords, that he obtained

a divorce *à mensâ et thoro*, and served Captain Berkeley with a writ in an action for crim. con., but that as he did not enter an appearance and could not in consequence of his remaining abroad be compelled to appear, a difficulty was felt about proceeding in the House of Lords, without a verdict in the crim. con. action.

1859.

July 8.

PELLEW

v.

PELLEW AND
BERKELEY.

We think that the "delay" intended by the 31st section of the Divorce Act must be that sort of delay which would show the petitioner to have been insensible to the loss of his wife, and might almost be said to be equivalent to condonation. Whatever delay there has been in this case is accounted for, and we therefore dissolve the marriage.

Marriage dissolved.

(Before the Full Court,—WIGHTMAN, J., WILLIAMS, J., and the
JUDGE ORDINARY.)

July 8.

DU TERREAUX v. DU TERREAUX.

DU TERREAUX

v.

DU TERREAUX.

*Dissolution.—Clandestine Marriage.—Reasonable Excuse for
Separation.—20 & 21 Vict. c. 85, s. 31.*

A., being only sixteen years of age, was privately married to B., aged thirty-six, without the consent of her family. On its being discovered that B. was an unsuitable husband for her, A. was removed to the Continent, and never saw him again. He made no attempts to procure cohabitation with her; and subsequently contracted a bigamous marriage.

The Court held, that there had been a reasonable excuse for the separation, and dissolved the marriage, on the ground of B.'s bigamy and adultery.

This was a suit for dissolution of marriage, promoted by Jane Catherine du Terreaux, on the ground of the bigamy and adultery of her husband, Thomas Webb du Terreaux.

In the petition it was alleged that the marriage was solemnized on the 15th of October, 1853; that the petitioner had never cohabited with the respondent; that on the 24th of April, 1858, he contracted a bigamous marriage with Ann Butcher, with whom he had since lived in adultery.

The respondent did not appear.

The petition was heard on oral evidence.

1859. *Dr. Phillimore, Q.C., and Mr. Welsby* appeared for the
July 8. petitioner.

DU TERREAUX The petitioner, formerly a Miss Kennerley, was the daughter
v. of a gentleman of property, who died in 1844. His widow
DU TERREAUX. subsequently married Dr. Brown, a physician.

The respondent, who had no acquaintance with the petitioner's family, was in 1853 a teacher of French, residing at Aberystwith, where the petitioner, with Dr. and Mrs. Brown (her mother) were then staying.

At seven o'clock of the morning of the 15th day of October, 1853, the petitioner, who was then only in her seventeenth year, went out, as it was supposed, to take her usual morning walk, and, without the knowledge of her family, was married to the respondent by license, at the parish church of Llanbadern Faur, distant a mile from Aberystwith. In the register, which they both signed, the age of the respondent was stated to be thirty-six, and that of the petitioner to be twenty-one. She returned home between nine and ten A.M., when she cried very much, and informed her mother of the marriage. Inquiries were made respecting her husband, and it being ascertained that he was not a suitable husband for her, and her friends considering that she had been entrapped into the marriage sent her to the Continent, where she remained for two or three years. From the time of the ceremony of the marriage up to the present time she had never seen or had any communication with the respondent.

He had, on the 24th of April, 1848, married Ann Butcher, with whom he had since lived in adultery.

In answer to a question from WIGHTMAN, J. :

Dr. Phillimore stated that the affidavit, on which the license was obtained, was not in Court. It was invariably required by the Marriage Act of George IV.

THE JUDGE ORDINARY regretted that it had not been produced in Court, although no doubt existed as to the party who made it.

WIGHTMAN, J. : In this case, the Court is of opinion that the petitioner is entitled to the relief she prays. The bigamy and adultery of the respondent have been proved.

It seems that at the age of sixteen the petitioner married a man who was at that time thirty-six. There is no doubt that immediately after the marriage, by the interference of her family, she was separated from her husband, and that she has never since cohabited with or seen him. He has never since attempted to procure cohabitation with her.

1859.

July 8.

DU TERREAUX
v.
DU TERREAUX.

This is a case where the Court has a discretionary power vested in itself, whether it will or will not decree the relief prayed, according to 20 & 21 Vict. c. 85, s. 31, where it is provided "that the Court shall not be bound to pronounce "such decree, if it shall find that the petitioner has, during "the marriage, been guilty of adultery, or if the petitioner "shall, in the opinion of the Court, have been guilty of un- "reasonable delay in presenting or prosecuting such petition, "or of cruelty towards the other party to the marriage, or of "having deserted or wilfully separated himself or herself "from the other party before the adultery complained of, and "without reasonable excuse." Here the ground for separation seems to have been reasonable; for the petitioner must, from the circumstances of the case, have been entrapped into the marriage, and this would be a reasonable excuse for the separation. It would have been very desirable to have had the affidavit before us, that we might know who made the oath upon which the licence was obtained. Perhaps it was the petitioner herself who made it; but this may have been done under the influence of the respondent. Upon the whole, however, this is one of those cases in which we think we may, in the exercise of the discretion given us by the statute, decree the dissolution of the marriage. *Marriage dissolved.*

(Before a Special Jury on the issue of Scotch or English domicil, and before the Full Court (WIGHTMAN, J., WILLIAMS, J., and the JUDGE ORDINARY), on proof and hearing of the undisputed facts of the petition.)

July 9.

TOLLEMACHE
v.
TOLLEMACHE.

TOLLEMACHE v. TOLLEMACHE.

*Petition for Dissolution.—Previous Sentence in Scotland.—
Lapse of Time.—Practice.—Costs.*

B., a domiciled Englishman, intermarried with C., a Scotchwoman, at

1859.

July 9.

TOLLEMACHE
v.
TOLLEMACHE.

Gretna Green, and at St. George's, Hanover Square, in August, 1837. B. and C. cohabited together in Wales, England, and Scotland, but principally in the latter, till March, 1841, soon after which date C. eloped with P., whereupon B. obtained a sentence of divorce in the Court of Session in Scotland, on the 3rd of July, 1841. On the 26th of July, 1841, C. intermarried with P. at Glasgow, and lived with him till his death in June, 1855. B. at first supposed the sentence of the Scotch Court to be of universal operation, and that supposition was confirmed by opinion of counsel in 1846. In 1854, he obtained the opinions of two counsel to the effect that the Scotch sentence would have no validity in England; in consequence of which he presented a petition for leave to bring into the House of Lords a Bill declaring his marriage with C. absolutely void since the 3rd of July, 1841, which petition was rejected. In 1858, B. petitioned the Court for dissolution of marriage, by reason of C.'s adultery in April, 1841, and at other times :

Held, that there was no such lapse of time as to constitute unreasonable delay under the 31st section of the Divorce Act.

By the answer to the above petition, the only issue raised was that of domicile, which was decided by the verdict of a jury in favour of the petitioner. The petition afterwards came before the full Court on proof of the facts not in issue, when the Court refused to allow the respondent's counsel to cross-examine the petitioner's witnesses, or to contest facts admitted on the pleas, but permitted him, after the proof of the facts of the petition, to argue, *rebus sic stantibus*, against the decree of dissolution, and, under the circumstances, to examine the petitioner.

The Court made a decree, dissolving the petitioner's marriage, but refused to make any order for payment of the wife's costs.

In this case the husband's petition for dissolution, after asserting an English domicile of origin, which he averred he had always retained, stated his marriage with A. M. Louisa Sinclair at Gretna Green, in Scotland, on the 6th of August, 1837, and also at the parish church of St. George's, Hanover Square, in the county of Middlesex, on the 12th of the same month; cohabitation in Wales, England, and Scotland, but principally in Scotland, and the birth of a child at Rothesay, in North Britain, in July, 1838; a charge of adultery against his wife at Glasgow, in the month of April, 1841, with a man, to the petitioner wholly unknown, but then passing by the name of Williams; a similar charge in Edinburgh; a marriage between the said A. M. Louisa Tollemache, on the 26th of July, 1841, with a man then passing by the name of John Power, at Glasgow, with whom she lived as

his wife till his death in June, 1855; that on or about the 1st of August, 1841, and on other days in the said year, at Edinburgh, Mrs. Tollemache committed adultery with the said John Power; that on the 3rd of July, 1841, a sentence of divorce between the petitioner and respondent was decreed by the Court of Session in Scotland.

1859.

July 9.

TOLLEMACHE
v.
TOLLEMACHE.

The respondent's answer alleged her domicil of origin as Scotch, and the marriage at Gretna Green; that from the 6th of August, 1837, till the month of April, 1841, the said H. B. Tollemache and A. M. Louisa Power, then Tollemache, cohabited together in Scotland, with the exception of occasional visits in England and Wales; that in the year 1837, Mr. Tollemache acquired a legal Scotch domicil, and was legally domiciled in Scotland till the 3rd of July, 1841, the date of the Scotch decree of divorce; that the said A. M. Louisa Power is not now the wife of the said H. B. Tollemache. The answer then prayed that their Lordships would pronounce a decree, declaring the marriage with the petitioner to be dissolved.

A verdict on the issue of domicil, raised by the above petition and answer, was found by a special jury on the 23rd of April, 1859, in favour of the petitioner.

April 23.

The petition came on for further proof and hearing before the Full Court,—WILLIAMS, J., MARTIN, B., and THE JUDGE ORDINARY.

July 9.

The Queen's Advocate, (Sir J. D. Harding,) and Mr. Mundell for the petitioner.

Mr. Edwin James, Q.C., Dr. Deane, Q.C., Mr. Kinnear, and Mr. J. A. Russell, for the respondent.

On the examination of certain witnesses in proof of adultery, *Dr. Deane, Q.C.*, objected to questions put by petitioner's counsel.

By THE COURT: What *locus standi* have you? Do you think that you have a right to dispute any fact which, as far as your client is concerned, is admitted on the record? It is very desirable to understand this question. If a party leaves

1859.

July 9.

TOLLEMACHE
v.
TOLLEMACHE.

matters of fact undisputed on the record, and then claims a right to come forward and controvert facts before the Court, it may be a surprise and hardship on the other party, and might necessitate his calling witnesses with whom he is not prepared. The Court is of opinion that it is not competent to you to cross-examine the petitioner's witnesses, or to appear to contest facts which have been admitted by your party on the record.

The case for the petitioner was then proceeded with. When Mrs. Tollemache eloped, she was staying with her parents in Edinburgh, and Mr. Tollemache was in England. On receiving the information he went to London, and, in consequence of advice he there received, determined on instituting the suit in Scotland.

W. Connell, parliamentary agent, was examined, with a view of explaining the delay in taking proceedings in England in this case. He said:—I first saw Mr. Tollemache as a client in the end of June, 1855, at the recommendation of Mr. Campbell of Edinburgh; he wished to be advised as to his position under the Scotch divorce. I advised him to take Dr. Addams's opinion, which was done in July, 1855, and in December of the same year the Queen's Advocate's opinion was taken on a similar case. As they agreed in considering an application for an Act to dissolve the marriage the only safe course, a further case was laid before Mr. Rolt, and by his advice leave was sought to bring in a Bill to dissolve and make void his marriage as from the 3rd of July, 1841; but on the 3rd of August, 1857, a select committee of the House of Lords reported against permitting such a Bill to be introduced. It also appeared, that in 1846 Mr. Tollemache entertained notions of a second marriage, and in consequence of doubts then expressed, took the opinion of counsel, which was in favour of the universal operation of the Scotch sentence: the intended marriage went off on other grounds, but Mr. Tollemache, till 1854, was under the impression that the Scotch divorce held good.

WILLIAMS, J., addressing the respondent's counsel, said: We expressed our opinion that you were not at liberty to

controvert facts admitted by the answer of your client; but the Court is of opinion that it is competent for you, on the assumption that the facts admitted are proved to the satisfaction of the Court, to controvert the propriety of a decree for dissolution *rebus sic stantibus*. We are also of opinion that Dr. Deane should be at liberty to examine Mr. Tollemache if he thinks proper.

1859.

July 9.

TOLLEMACHE

v.

TOLLEMACHE.

Dr. Deane refused to examine Mr. Tollemache, but argued against the prayer of the petition.

MARTIN, B.: What harm will be done to your client if we make the decree of dissolution as prayed? The decree of this Court cannot alter the effect of what has taken place; if the children of Power are legitimate, the decree of this Court cannot bastardize them.

BY THE COURT: The Court is of opinion that the petitioner is entitled to the decree of dissolution.

The first question which arises on the proceedings is, whether the Court has jurisdiction to entertain the petition? If a valid divorce has already been had by the proceedings in Scotland, it would be idle and unfounded to come to the Court for a further remedy; but without going into the question of the effect of the divorce in Scotland in respect of the second marriage there contracted, and the children of that marriage, sitting here as an English Matrimonial Court we cannot recognize that divorce as putting an end to the marriage-bond of a domiciled Englishman. Secondly, the petitioner has proved his case in respect of the adultery charged. Thirdly, has there been, in the opinion of the Court, unreasonable delay in presenting the petition? It is a very long period of time since the petitioner first took advice on this matter in England, and, if unexplained, might fall under the head of unreasonable delay. Immediately after the adultery, a divorce was obtained in Scotland in July, 1841. Till 1855 he is quiescent. The word "delay" in the 31st section must be understood to be culpable delay, somewhat in the nature of connivance or acquiescence; but there is no reason to impute delay in that sense. As to his not proceeding for damages,

1859. we can well understand the petitioner being satisfied with the
 July 9. earlier opinion taken, that the divorce in Scotland was equi-
 TOLLEMACHE valent to a full dissolution of marriage. In 1855, his doubts
 v. on this point were again raised, and he then does what he can
 TOLLEMACHE. to get relief by a Bill in Parliament, and failing that, insti-
 tutes a suit in this Court no long time after its establishment.

Dr. Deane applied for the respondent's costs: Sitting here as an English Court, the petitioner and respondent should be looked upon as husband and wife, and if he had proceeded earlier, he would have had to pay her costs in the House of Lords. She had no means. Till the decision this moment given, we did not know whether she was a wife or not. Secondly, this is not like cases where the husband comes for relief ordinarily; he comes here, in fact, to ascertain his *status*, and there is no reason why she, after such a lapse of time, should be put to expense on that account.

The Queen's Advocate contra.

By THE COURT: We are of opinion that we ought not to allow costs. *Marriage dissolved.*

November 18. (*Before the Full Court,—THE JUDGE ORDINARY, WILLIAMS, J., and
 BEAMWELL, B.*)

BOYD v. BOYD
 AND COLLINS.

BOYD v. BOYD AND COLLINS.

*Co-respondent.—Costs.—Order on Respondent to deliver up
 Child.*

Where the wife's conduct has been profligate, and that to the husband's knowledge, before the adultery committed with the co-respondent, the latter will not be liable to costs.

On a sentence of dissolution by reason of the wife's adultery, the Court will make an order on her to deliver up the custody of the children, rather than leave the husband to the expense of establishing his right, as father, at common law.

This was an undefended petition for a dissolution of marriage by reason of the wife's adultery.

Mr. Brandt, for the petitioner, after the case was proved, 1859.
asked for costs against the co-respondent. November 18.

BOYD v. BOYD
AND COLLINS.

BY THE COURT: We consider this is not a case for costs. It appears that the respondent was an exceedingly profligate woman; profligate before she had to do with Collins, and that with her husband's knowledge, and he seemed disposed to put up with a good deal. If the co-respondent had the aspect of a seducer in the first instance, the costs would generally be imposed upon him.

Mr. Brandt then asked for an order on the respondent to deliver up a child who was in her custody; if she refuse, attachment is an easier process than *habeas corpus*. An interim order in favour of the father was made in *Spratt v. Spratt*, ante, 215.

BY THE COURT: We think there are reasonable grounds for the Court to make the order you ask for. The order is part of the judgment of the Court on the decree for dissolution. If we refuse the order, you would have to establish your case before another Court; and though we have no doubt you would prove the petitioner's right there, as father, to the custody of the child, yet there might be a discussion there and expense incurred.

*Order on the respondent to deliver up the
child within a week.*

(Before the Full Court,—THE JUDGE ORDINARY, WIGHTMAN, J., November 22.
and BYLES, J.)

WILTON v. WILTON AND CHAMBERLAIN.

WILTON
v.
WILTON AND
CHAMBERLAIN.

*Petition for Dissolution.—Previous Adultery of Wife condoned.
—Absence of Husband.—Costs.*

B. received back his wife, after adultery by her committed, in May, 1856. In June, 1857, he left England for Australia, to ascertain his prospects in settling, leaving his wife in business in Devonport, close

1859.
November 22.

WILTON
v.
WILTON AND
CHAMBERLAIN.

to her own mother. The wife, during his absence, committed adultery with the co-respondent, and sold off the stock-in-trade. The Court dissolved the marriage, and condemned the co-respondent in the costs.

This was an undefended petition for dissolution of marriage by reason of the wife's adultery.

Mr. Collier, Q.C. (Mr. Turner with him), for the petitioner. Counsel, in opening the case, stated that in May, 1856, Mr. Wilton, who was a confectioner at Devonport, had received back his wife after adultery committed by her, on her expression of deep contrition. It appeared in evidence, that in June, 1857, Mr. Wilton went to Australia, two of Mrs. Wilton's brothers going in the same ship, to ascertain what prospects he might have of establishing himself in business there, with the intention of removing his wife from Devonport, which he thought better after what had happened. He left his wife to superintend the business in Devonport during his absence, her mother living close to her. Mrs. Wilton, however, contracted an intimacy with Chamberlain, who went constantly to the house and slept with her there, and in May, 1858, before her husband's return, Mrs. Wilton sold off his stock-in-trade. In August, 1858, a child was born.

BY THE COURT: The Court is satisfied that the case is established. It was necessary to inquire into the circumstances under which the husband left her for Australia, especially after the statement of counsel as to her previous misconduct; but it is proved that his motives were kind and well-intentioned towards her. We decree the dissolution of the marriage, and condemn the co-respondent, who invaded the house of the husband, in costs.

(Before the Full Court,—THE JUDGE ORDINARY, WATSON, B.,
HILL, J., and a Special Jury.)

1859.

December 6.

BELL v. BELL AND MARQUIS OF ANGLESEY.

BELL v. BELL
AND MARQUIS
OF ANGLESEY.

Petition for Dissolution.—Damages.—Marriage Settlements.—

20 & 21 Vict. c. 85, s. 33.—22 & 23 Vict. c. 61, s. 5.

QUERE, whether the Court has power to deal with marriage-settlements on a decree for dissolution of marriage, under 22 & 23 Vict. c. 61, s. 5, unless there be children of the marriage:

SEMBLE, the position of the husband, as regards the marriage-settlements, may properly be submitted to the jury for their consideration in the assessment of damages.

The only point worth noting in this case was the ground on which the counsel for Mr. Bell, *Mr. M. Chambers*, Q.C. (*Dr. Deane*, Q.C., and *Mr. Cleasby*, with him), asked for damages. After the evidence in proof of the petition had been given:

Mr. M. Chambers stated:—The reason why Mr. Bell asks to have damages assessed is, that £5,000 being settled to Mrs. Bell's separate use during her life, the Court has power given it by 22 & 23 Vict. c. 61, s. 5, to deal with marriage-settlements under certain circumstances. That section is as follows: "The Court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of contemplated or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage, or of their respective parents, as to the Court shall seem fit." But on the wording of this section it seems very doubtful whether the Court could make any order with respect to settled property, where, as in the present case, there is no issue of the marriage. Mr. Bell, therefore, thinks himself justified in asking the jury, by their assessment of damages, to indemnify him for the £5,000 so settled to Mrs. Bell's separate use.

Mr. Edwin James, Q.C. (*Mr. Gordon Allan* with him), for the co-respondent.

1859.

December 6.

BELL v. BELL
AND MARQUIS
OF ANGLESEY.

THE JUDGE ORDINARY (to the jury) : This is a very simple case; of the adultery, I imagine, you can have no doubt. When the Act of Parliament which constituted this Court was under discussion, great objection was taken to the old action for criminal conversation; there was considerable difference of opinion about it, and by section 59 of the Divorce Act it was abolished. If, however, in section 33, which enables the husband to apply for damages in this Court, you substitute the word "declaration" for "petition," the result is, that the Act has made no difference in the state of the law in this particular. To deal with this case, then, as if it were an action at common law, I must remark, that I have never heard any question of settlements introduced as a ground for giving damages. It has always been considered that the only question was, of the loss to the husband of the society of the wife.

Mr. M. Chambers suggested that in *Dr. Lardner's* case, the question of the marriage settlement formed part of the matter submitted to the consideration of the jury in assessing damages. See also Buller's *Nisi Prius*, p. 27, edit. 1772.

Mr. Edwin James, as regards *Lardner's* case, admitted that this was so.

THE JUDGE ORDINARY : On that precedent I will not withdraw the statement of the learned counsel as to settlements from the consideration of the jury. That must, however, have been an exceptional case, and I think there must have been some other circumstances in it with which we are not acquainted. You have then to consider the position of the parties, the terms on which husband and wife lived together before her adultery broke off their cohabitation, the circumstances under which the adulterer was introduced, and the means he has to pay the damages you may assess. In this case, there was not much evidence of the married life of the parties laid before you. The solicitor who was examined said generally he did not consider it a happy marriage. The butler talked of complaints, on the husband's part, of too much company. How the marquis became acquainted with the wife was not explained. It does not appear that the husband was guilty of

inattention, or of exposing his wife to undue temptation. 1859.
 There was no proof of any previous familiarities to arouse December 6.
 his suspicion ; on the other hand, you have the marquis taking
 advantage perhaps of the *prestige* of his rank, in making a
 vain woman false to her duty to her husband. BELL v. BELL
AND MARQUIS
OF ANGLESEY.

*The jury found a verdict for the petitioner,
 and gave £10,000 damages.*

(*Before the full Court*,—THE JUDGE ORDINARY, WIGHTMAN
 and BYLES, JJ.)

November 25
 and 26.

LLOYD v. LLOYD AND CHICHESTER.

LLOYD

v.

Adultery proved.—Collusive Prosecution of Petition.—
 20 & 21 Vict. c. 85, ss. 29, 30.

LLOYD AND
 CHICHESTER.

Though the Court may be satisfied that the adultery is proved and that the petitioner was neither accessory to nor conniving at it, it will, under the 30th section of the Divorce Act, dismiss the petition, if it appears that the parties, or their agents with their knowledge, were acting in concert with each other as to the conduct and prosecution of the suit.

This was a petition for dissolution of the marriage, at the suit of the husband, by reason of the wife's adultery. The marriage took place in 1853. The petitioner was a captain in the militia ; his father, Mr. Eyre Lloyd, was a gentleman of some property in Ireland ; Mrs. Lloyd's maiden name was Cheese ; two children had been born of the marriage. In 1856 Captain Lloyd was in prison in the Queen's Bench for debt ; whilst he was there Mrs. Lloyd formed a connection with the co-respondent, on discovering which Captain Lloyd refused to return to cohabitation. In 1857–58 Captain Lloyd was again in the Queen's Bench. In January, 1859, the petition and citation were served on Mrs. Lloyd and Chichester at Paris. A woman named Morgan, who had been in the service of Mr. Cheese, the respondent's father, and was again in his service when the petition was heard, but who was with Mrs. Lloyd and Chichester in Paris when the citation was served, was one of the witnesses. In answer to questions from the Court, Morgan said

1859. that she had seen a Mr. Isaacson in London, and that he had
Nov. 25 & 26. been to Paris.

LLOYD
v.
LLOYD AND
CHICHESTER

Mr. H. James conducted the petitioner's case.

No counsel appeared for the respondent or co-respondent.

THE JUDGE ORDINARY inquired whether Mr. Isaacson was in Court? He was then sworn and examined by the Court. He stated that he was an agent, and had been employed to go to Paris to serve the citation on Mr. Chichester and Mrs. Lloyd; that he had previously communicated with Captain Lloyd about the suit, but he did not know that he instituted it at the instance of Mr. Cheese; that he knew Mr. Cheese and Captain Lloyd, having been confined with the latter in the Queen's Bench; that Mr. Cheese did not undertake to pay the expenses of the suit if Lloyd would institute it; that he never heard that Lloyd stipulated to receive money from Cheese before he would sign the petition; that he (Isaacson) was selected to serve the citation because he had known Chichester intimately for many years; that he stayed in Paris nearly three weeks; did not see Chichester for five or six days; after that saw him almost every day; dined with him and Mrs. Lloyd several times; when at a restaurant's witness paid for the dinners; when at Chichester's lodgings he paid. Witness agreed to advance Chichester £50 payable on Mrs. Lloyd's order; of this Chichester handed £25 to witness. He let witness have it out of kindness. Witness's charge for the journey to Paris to serve the citation and to collect evidence was £100.

THE JUDGE ORDINARY read an item from a bill of costs, which had been taxed by Mr. Strutt, the attorney originally employed against Captain Lloyd—"To Mr. Isaacson for proceeding to Paris for the purpose of obtaining the necessary evidence, according to the instructions of Mr. Cheese, Mr. Cooke, and Mr. Strutt, he having also advanced a sum of money to enable him to effect a certain arrangement by which the chain of evidence might be completed"—and asked the witness whether he had advanced money to Chichester

for that purpose, who admitted he had advanced money to enable Chichester to come from Dieppe to Paris. 1859.

Nov. 25 & 26.

Mr. H. James then said that *Mr. Cooke* wished to give his account on oath of the transaction so far as he had to do with it.

LLOYD
v.
LLOYD AND
CHICHESTER.

BY THE COURT: We must consider whether we can allow that. Is *Mr. Strutt* in Court?

On this being answered in the negative, the case was adjourned in order to examine *Mr. Strutt*, who had in the outset acted as *Captain Lloyd's* attorney, but had ceased to do so, and the taxation of whose bill had brought circumstances to the knowledge of the Court which led to the present inquiry.

On the 26th November *Mr. Strutt* was in attendance and was sworn and examined by the Court:—I was the attorney employed by *Captain Lloyd* in this suit some time in November, 1858: I had been introduced to *Captain Lloyd* on other matters previous to the suit; no one requested me to go to *Captain Lloyd* as to this suit; he was then in the Queen's Bench prison. I conducted the suit for some time and then would not go on with *Captain Lloyd's* affairs; there was a change of attorneys; the bill I offered to be taxed as against *Captain Lloyd* was a true statement of the matters contained therein, to the best of my belief. Early in November I had a communication with *Captain Lloyd* as to the expense of the suit; he proposed that, as a sum of money was coming to him from his father-in-law *Mr. Cheese*, he should be at liberty to appropriate some of that money to the expenses of the divorce, to the payment of creditors, and other private purposes; it was some reversionary interest. I then saw *Mr. Cheese* and tried to arrange that he should pay the money to *Captain Lloyd* for the purposes stated; but *Mr. Cheese* had nothing to do with the mode of the application of the money; there was no arrangement with *Mr. Cheese* as to costs or damages against *Mr. Chichester*. *Captain Lloyd* left the matter in my hands as a mutual friend; he swore positively he would have nothing to do one way or other with this suit unless *Mr. Cheese* paid over the money; otherwise he said he did not believe he should get the money. He wanted to stipulate not to sign the pe-

1859. tition till £600 or £700 had been paid him by Mr. Cheese.
 Nov. 25 & 26. Mr. Cheese appeared anxious for the divorce. When Captain
 ——— Lloyd signed the petition I handed him £10 from Mr.
 LLOYD Cheese; that and other moneys he received afterwards through
 v. Mr. Cooke were part of the money he was to have under the
 LLOYD AND reversionary interest. I cannot say whether it was or was not
 CHICHESTER. a consideration for signing the petition. It was suggested by
 me at a conference with Mr. Cooke that Isaacson should serve
 the citations at Paris, because he was acquainted with Chiches-
 ter. I told Lloyd that Cheese wished Isaacson to go to Paris
 as an intimate friend: I gave instructions to Isaacson to go.
 I supplied him with money, £50, which I received from Cooke
 —Captain Lloyd had no money.

Mr. H. James asked to be allowed to cross-examine the witness.

BY THE COURT: We think it reasonable that you should do so.

Mr. Strutt was accordingly cross-examined at some length, but without shaking his evidence as to the above facts.

Mr. H. James then offered Captain Lloyd, Mr. Cheese, and Mr. Cooke to be examined, and the Court heard Mr. Cooke's statement on oath to the following effect:—I have known Mr. Cheese's family many years. In 1856 I was requested by Mrs. Lloyd to endeavour to reconcile her father and husband; the former had never approved the marriage, and had refused to receive his son-in-law; I did not succeed. When Captain Lloyd came out of prison on a letter of leave from his creditors, and refused to renew cohabitation with his wife, alleging that she had been guilty of adultery, I found it impossible to bring the young people together. Mrs. Lloyd's father asked me as a mutual friend to carry out family arrangements for a separation, and for certain releases of the family property. In 1858 I was instructed by Mr. Strutt, of the Temple, as Captain Lloyd's solicitor, to draw a petition for dissolution; he was then in prison, and there was a difficulty about swearing the affidavit. I had seen Lloyd's brother; he made known to me that Mrs. Lloyd was living with Chichester in Paris, and

supposed I knew it, from my acquaintance with the family. Mr. Cheese had hitherto opposed the divorce, because he said the charge was untrue. Mr. Cheese now came to me and admitted that his daughter was living with Chichester. I said he ought no longer to resist the divorce, that his son-in-law was entitled to it. I thought, if facilities of evidence were given by Mr. Cheese, the adultery could be established. We entered on the subject of purchasing Lloyd's reversionary interest in Cheese's and Mrs. Lloyd's property. Lloyd had assigned his interest to his father. Isaacson called on Cheese the next morning and took him to Strutt. Cheese came to me and asked if I would see Strutt; he said that Strutt was employed by Lloyd's father to arrange all his affairs. Strutt, Isaacson, and Cheese came to my chambers; I received Strutt as Lloyd's solicitor. Strutt wanted Cheese to advance money for Lloyd's immediate benefit. Cheese refused to advance a shilling, and I expressed an opinion that a suit of this sort ought not to cost above £50. I intimated that I should write to Lloyd that I thought under the circumstances the suit ought to be prosecuted. I expressed a hope that Mrs. Lloyd would not be insulted by any offensive manner of serving the citation, upon which Strutt suggested that Isaacson, who knew Chichester, should serve it. Strutt mentioned that Lloyd was in great distress. Cheese at first refused to give anything, but consented at my instance to give £10, certainly on no condition. Mr. Strutt sent me instructions as to facts to settle citation. In December Strutt told me Isaacson could not go to Paris in this matter without money. I gave him £50. Mr. Cheese repaid me the money. £50 was advanced by Isaacson to Chichester on an order from Mrs. Lloyd to her father to pay her next quarterly payment. In January Isaacson waited on me to say his journey to and stay in Paris cost £150. I had an interview with Strutt on the subject, and then wrote to Eyre Lloyd in Ireland, and asked him to come over. When he came I ascertained that Strutt had no authority from the Irish branch of the family, and was altogether a stranger to them. The reversionary interest alluded to is in some funded property of Mr. Cheese, I think secured to Lloyd for life contingently on his surviving his wife. Lloyd was anxious to have from Cheese the value, as he thought, of that reversion.

1859.

Nov. 25 & 26.

LLOYD

v.

LLOYD AND
CHICHESTER.

1859. *Mr. H. James* proposed to examine the petitioner, but the
 Nov. 25 & 26. Court would not allow it; he then stated that *Mr. Cheese* was
 present, if the Court wished to examine him.

—
 LLOYD

v.

LLOYD AND
 CHICHESTER.

THE JUDGE ORDINARY: You may call him if you please, but the Court does not require that he should be examined. In this case the Court is of opinion that there can be no doubt of the adultery committed by the respondent and co-respondent; but it is one of those cases in which the Court felt it to be its duty to give effect to the 29th section of the statute: "Upon any such petition for the dissolution of a marriage it shall be the duty of the Court to satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or no the petitioner has been in any manner accessory to or conniving at the adultery, or has condoned the same; and also shall inquire into any counter-charge which may be made against the petitioner." Now the Court does not find that the petitioner has been accessory to or has connived at the adultery; but the 30th section provides, "that if the Court shall find that the petition is presented or prosecuted in collusion with either of the respondents, then the Court shall dismiss the said petition." The case presented some curious features during the examination of the witnesses yesterday, and we felt it our duty to call Isaacson; he told us he was selected by Lloyd to serve the citations because he was on intimate terms with Chichester; and it appeared that, having gone to Paris for that purpose and to get up evidence, he was living there familiarly with Chichester and Mrs. Lloyd, dining with them and they with him; and to such an extent was this carried that he had an opportunity of seeing them in bed together. I asked him whether he advanced money to Chichester. He said, "Mrs. Lloyd drew a cheque on her father for £50, on which he advanced £50 to Chichester, of which Chichester gave him £25." I asked him whether he advanced money for enabling Chichester to complete the chain of evidence. He could not deny it. Lloyd might have satisfied the Court that this was only an error of his agent; but it appears that there was a communication, not denied by Mr. Cooke, and affirmed by an entry of Strutt's in this bill, in which Strutt expressed himself anxious

that the suit should go on, and Lloyd protested he would take no step in the matter till he had received a payment for the reversionary interest, because he thought, if the marriage were dissolved, the reversionary interest would be lost; whether this would in fact have been the case is immaterial. Did he or did he not bargain for £10 on signing the petition? There can be no doubt he did. Then we have Mr. Cooke's remark to Cheese that he might as well give the parties some facilities in the way of evidence. Without entering into further particulars, the case seems of the same character as *Chisim's* case, reported in Mr. Macqueen's Practice of the H. of L. p. 582, in the following words: "The solicitor for the petitioner was called in, and being sworn, produced and proved an office copy of the judgment of the Court of Common Pleas against Mr. William Greaves for criminal conversation with Mrs. Chisim. Being asked what Mr. Chisim and Mr. Greaves were, he said Mr. Chisim was a drysalter and Mr. Greaves a man of property. Being asked if he had received the costs of the suit in Common Pleas, he said he had not, nor had he taken out execution. Being asked if he thought the plaintiff meant to take out an execution, he answered, if the plaintiff were not paid he thought he would. Being asked why the plaintiff had not demanded them before, he answered that he believed it was owing to his (witness's) delay in taxing his costs. Being asked who was to pay him his bill and all expenses, he said a near relation of Mrs. Chisim's, whose name was Roberts; that the said Mr. Roberts was nearly related to Mrs. Chisim, and lived upon his fortune at Bexhill, in Sussex. Being asked what relation the said Mr. Roberts was to Mrs. Chisim, said he was her father. Then the witness was asked if any defence was made by Mrs. Chisim in the Ecclesiastical Court; he answered that counsel attended for both parties, but witnesses were produced on the part of Mr. Chisim only. The adultery was clearly proved, but the appearances of collusion were too gross and palpable to admit of being overlooked or explained, and the bill was rejected." Acting upon that principle, we say the evidence of collusion in this case is too gross and palpable to be overlooked, and dismiss the petition.

1859.

Nov. 25 & 26.

LLOYD
v.LLOYD AND
CHICHESTER.

1859.

December 7.

YELVERTON
v.
YELVERTON.

(Before the JUDGE ORDINARY.)

YELVERTON v. YELVERTON.

Suit for Restitution of Conjugal Rights.—Power of Wife to acquire a separate Domicil.—Domicil to found Jurisdiction of Court.—Domicil of an Irishman after enlisting in the Army.—Ireland and Scotland.—Jurisdiction.—Tenducci's Case, 1775.

The domicil of the husband is the domicil of the wife, and even where he has been guilty of such misconduct as would furnish her with a defence to a suit by him for restitution of conjugal rights, she cannot on that ground acquire a separate domicil for herself.

The word domicil has many meanings, according as it is used with reference to succession and other purposes. A person may have retained a foreign domicil for many purposes, and yet may be domiciled in England so as to give jurisdiction to the Court for Divorce and Matrimonial Causes; but if he has never resided in England, except temporarily, and is not there at the time of the commencement of the suit, he is not subject to its jurisdiction.

A domiciled Irishman, by enlisting in a regiment in her Majesty's service, the head-quarters of which are in England, does not thereby acquire an English domicil.

For the purposes of the question of the jurisdiction of the Court, Ireland and Scotland are to be deemed foreign countries. Circumstances of the case of *Tenducci v. Tenducci*, 1775.

A. intermarried with B., a major in H.M. Royal Artillery, at Edinburgh, in April, 1857, and in August, 1857, the marriage was celebrated in Ireland according to the rites of the Romish Church. In April, 1858, B. deserted A. at Bordeaux, and had since that time been stationed with his regiment at Edinburgh. B.'s domicil of origin was in Ireland, and he had never acquired a domicil in England. A. petitioned for restitution of conjugal rights, and described herself as resident in England. B. appeared under protest to the jurisdiction.

HELD, that, as there was no proof of B. having acquired an English domicil, and A.'s domicil was that of her husband, the Court had no jurisdiction to entertain the suit.

This was a suit for restitution of conjugal rights, promoted by Maria Theresa Yelverton, described in the petition as of Maida Hill, in the county of Surrey, against William Charles Yelverton. The petition alleged: (1) That on the 13th day of April, 1857, the petitioner was lawfully married under her

then name of Marie Theresa Longworth, spinster, to William Charles Yelverton, then and now a major in her Majesty's Royal Regiment of Artillery, at Edinburgh. (2) That the aforesaid marriage was and is a good and valid marriage according to the law of Scotland. (3) That the petitioner was afterwards, on the 15th day of August, 1857, lawfully married to the said William Charles Yelverton at Killowen, in Ireland, according to the rites of the Roman Catholic Church. (4) That the aforesaid marriage was and is a good and valid marriage according to the law of Ireland. (5) That she subsequently lived and cohabited with her said husband at divers places, and amongst others in Ireland, Edinburgh, Hull, and France, until the month of April, 1858, and that there has been no issue of such marriage. (6) That the said William Charles Yelverton had, ever since the month of June, 1858, without any just cause refused, and still refuses, both to permit her to cohabit with him, and also to render her conjugal rights. The petition concluded with a prayer that the Judge Ordinary would be pleased to declare that she was lawfully married to the said William Charles Yelverton, and to order that the said William Charles Yelverton take her home and receive her as his wife, and render her conjugal rights, etc.

The citation and a copy of the petition were served on the respondent at Edinburgh. The respondent appeared under protest, and having obtained leave from the Judge Ordinary to plead to the jurisdiction of the Court, pleaded as follows:— That he the said W. C. Yelverton was at the time of the commencement of the suit, and still is, a major in the British army and a captain in her Majesty's Royal Artillery stationed at Leith Fort, Edinburgh, in the kingdom of Scotland; and that he was at the time of the commencement of this suit, and hath since continued to be, and still is, resident at Edinburgh aforesaid, and that his domicile of origin is in the kingdom of Ireland, and that he has never abandoned such domicile or acquired any domicile elsewhere. Wherefore the said William Charles Yelverton insists that he ought not to be compelled to make any answer to the petition filed in this suit, and that this Court ought not to take further cognizance thereof.

The petitioner filed a replication to the effect, that before and at the time of the commencement of this suit the petitioner and

1859.

December 7.

YELVERTON
v.
YELVERTON.

1859. the respondent were respectively subjects of our Lady the Queen,
December 7. and that the petitioner before and at the time of the commence-
ment of this suit was, and still is, resident in England, to wit,
YELVERTON at No. 12, Randolph Road, Maida Hill, in the county of Mid-
dlesex, and that the respondent before and at the time of the
YELVERTON commencement of the suit was, and still is, on full pay of her
Majesty's Royal Regiment of Artillery, the head-quarters of
which were and are at Woolwich, in the county of Kent, and
within the jurisdiction of this Honourable Court, and by reason
thereof the said respondent, at the time of the commencement
of this suit, was, and still is, domiciled at Woolwich aforesaid,
and within the jurisdiction of this Honourable Court. Where-
fore the petitioner insists that this Honourable Court ought to
take cognizance of the matters contained in her said petition,
and that the respondent ought to be compelled to make answer
to the said petition.

The cause came on for hearing on the 30th of July, 1859,
before the Judge Ordinary.

Dr. Phillimore, Q.C., and Mr. G. Honyman, for the petitioner.

Mr. James Anderson, Q.C., and Mr. W. A. Clark, for the respondent.

The counsel for the respondent began; and at the close of
their arguments, on the application of Dr. Phillimore, leave
was granted to amend the replication on payment of the costs
of the day.

The following replications were then filed by the petitioner:
(1) That before and at the time of the commencement of this
suit, the petitioner and the respondent were respectively sub-
jects of our Lady the Queen. (2) That in February, 1840,
the respondent, being of the age of fourteen years, left the
house of his father at Belleisle, near Portumna, in the county
of Galway, in Ireland, where he was then residing, and came
to England, and entered the Royal Academy at Woolwich, in
the county of Kent, as a cadet, and there continued until
the 11th of January, 1843, when he obtained a commission
as Lieutenant in her Majesty's Royal Regiment of Artillery.
(3) That the respondent has thenceforth continued on full pay

of the said Royal Regiment of Artillery, the head-quarters of which, before and at the time of the commencement of this suit, were at Woolwich aforesaid, within the jurisdiction of the Court. (4) That when the respondent left Ireland as aforesaid, he did so with the intention of not returning thither, and that he has not since resided in Ireland, except for the purpose of visiting his father at Belleisle aforesaid, and except on the occasion mentioned in the third paragraph of the petition, when he went thither for the sole purpose of being there married to the petitioner. (5) That the respondent is not, and never was, seised or possessed of any house or land or any property whatsoever situate in Ireland. (6) That the respondent, on the 8th of June, 1859, in the Court of Session in Scotland, instituted against the petitioner a suit of Declaratory of marriage and putting to silence. (7) And that at the time of the commencement of the said suit he was domiciled in Scotland.

Second replication. (8) That after the marriage at Edinburgh, and after the marriage in Ireland, the petitioner and the respondent lived and cohabited together as man and wife in Ireland, at Edinburgh, at Hull, in England, and at Bordeaux, in the empire of France. (9) That in April, 1858, the respondent deserted her at Bordeaux aforesaid, and went to Edinburgh. (10) That the respondent has always since refused to live and cohabit with her as his wife, though requested by her so to do, and has thenceforth continued to live separate and apart from her. (11) That on the 26th of June, 1858, the respondent, at Trinity Chapel, North Leith, in the kingdom of Scotland, did unlawfully, but in fact, marry Emily Marianne Forbes, a widow, with whom he has thenceforth lived and cohabited at Edinburgh, and by whom he has had issue. (12) That at the time of the commencement of this suit she was, and still is, domiciled within the jurisdiction of this Court, to wit, at No. 12, Randolph Road, Maida Hill, in the county of Middlesex.

Rejoinder. (1) With reference to the second paragraph of the said replication, that between February, 1840, and the 11th of January, 1843, the respondent was frequently at his father's residence at Belleisle, in the county of Tipperary, in Ireland; and that he went there whenever an opportunity

1859.

December 7.

YELVERTON
v.
YELVERTON.

1859. offered itself, as it did during the times of vacation in summer
December 7. and winter of each year, for the period of seven weeks each,
or thereabouts. (2) With reference to the third paragraph,
YELVERTON that after obtaining his commission he became and continued,
v. down to the commencement of the present suit, the officer in
YELVERTON. command of the 1st company of the 9th battalion of her
Majesty's Royal Artillery, and for two years and upwards
prior to such commencement he was with the said company
stationed at Leith, near Edinburgh, in Scotland; that a general
order of his Royal Highness the General Commanding-in-Chief,
relating to the Royal Artillery, dated the 1st of April, 1859,
after stating that her Majesty's Government, on the recommendation
of his Royal Highness, had decided that the head-quarters of the
Royal Artillery should remain as theretofore at Woolwich, but that
the staff of the battalions should be distributed to the several districts
and garrisons at home and abroad; for that purpose directed, amongst
other things, that the then terms "battalion" and "troop" should be
superseded by those of "brigade" and "battery;" that the regimental
staff of the then existing battalions should form brigades, bearing
corresponding numbers, and be distributed as therein mentioned; and
then proceeded to allot the head-quarters of each of the fifteen
brigades of the Royal Artillery, and fixed the head-quarters of the
9th brigade Field Artillery at Ballincolig, in Ireland; that in pursuance
of the said general order the said company of the 9th battalion of the
Royal Artillery has become the 7th battery of the 9th brigade of Field
Artillery; and since the said change was effected, the said William
Charles Yelverton has been and is now the commanding officer of the
7th battery; that the head-quarters of the 9th brigade, which by the
said general order were directed to be at Ballincolig, were by a
subsequent general order, dated the 17th of May, 1859, transferred
to Dublin, where they now are. (3) With reference to the fourth
paragraph, that he denied it to be true that when he left Ireland
he did so with the intention of not returning thither; for, on the
contrary, he left it with the intention of preparing himself for
entering into her Majesty's service, and, subject to the orders he
should receive as to his being stationed at other places, he intended
to retain the domicile and abode of his father; and that besides
spending

his vacations while at Woolwich as before mentioned, he obtained several periods of leave of absence from his company, and on each of these occasions resorted to his father's residence in Ireland, and remained there until the term of his leave expired. (4) With reference to the fifth paragraph, that, subject to the prior estates of his father, Viscount Avonmore, and his elder brother, the Hon. G. F. W. Yelverton, and the estate in tail male, limited to the sons of such brother, the family mansion and estates of Belleisle and Derry Island, in the county of Tipperary, and the family estates in the county of Mayo, in Ireland, are settled upon him for life, with remainder to his first and other sons in tail male; and the said Hon. G. F. W. Yelverton was married in 1855 to his present wife, and has had no issue; and that the respondent is not, and never was possessed of any lands or houses, or of any interest in any lands or houses, nor has he any property of any description situate in England. (5) With reference to the sixth paragraph, that the suit which he instituted in the Court of Session in Scotland against the petitioner was in the nature of a suit of jactitation of marriage, and the summons therein concluded or prayed that it should be declared that the said William Charles Yelverton was free of any marriage with the petitioner, and that she ought to be put to perpetual silence thereanent in all times coming; that previous to this suit having been commenced, that is to say, on the 7th of August, 1858, the petitioner instituted a suit in the said Court of Session against him, the summons in which concluded or prayed that it should be declared that the petitioner and he were lawfully married persons, and that this last-mentioned suit continued to be, and at the time when he instituted his said suit on the 8th of June, 1859, was in dependence.

1859.
December 7.
YELVERTON
v.
YELVERTON.

Mr. Anderson, Q.C. (Mr. W. A. Clark with him), for the respondent, in support of the plea to the jurisdiction.

The facts alleged in the pleadings are not sufficient to give this Court jurisdiction over the respondent. He is not, and never has been a domiciled Englishman. His domicile of origin is Irish, the *locus contractus* of his marriage was Scotland, and his present residence is in Scotland.

This Court has by the Divorce Act (20 & 21 Vict. c. 85, s. 6),

1859.
December 7.
YELVERTON
v.
YELVERTON.

the same jurisdiction as to suits for restitution of conjugal rights as the Ecclesiastical Courts had, and their jurisdiction was, it is submitted, limited to persons domiciled in England. [THE JUDGE ORDINARY: Suppose the marriage had been celebrated in England?] That would not have been of itself sufficient to found the jurisdiction of the English Court. In Shelford on Marriage and Divorce (p. 486), it is said, "in matrimonial causes the power of the Court is *in personam*, and depends on the locality of the person cited. Although a defendant may usually reside out of the kingdom, yet if he is served with a citation within the jurisdiction of an Ecclesiastical Court in England, as that of the Consistory Court of London, in a suit for nullity of marriage, that Court has jurisdiction to try the validity of the marriage, wherever it may have been contracted. (*Morse v. Morse*, 2 Hagg. Eccl. 610; *Donegal v. Donegal*, 3 Phill. 599; *Harford v. Morris*, 2 Cox, 425.)" [THE JUDGE ORDINARY: By the 42nd section of the Divorce Act the Court has authority to serve its process anywhere out of its jurisdiction.] That section of the Divorce Act assumes that the party to be served is subject to the jurisdiction of the Court; it does not confer jurisdiction. It may be contended that the respondent acquired an English domicile by entering into and continuing in the Royal Artillery. But our military service is British, and not English; and if a Scotchman or Irishman enters into the army, his former domicile is not changed either actually or constructively; he is still considered to be domiciled in the subdivision of the empire where he was domiciled when he entered the service. (Phillimore on Domicil, p. 76) The Court would have no means of enforcing the decree prayed against the respondents. (*Morse v. Morse*, 2 Hagg. Eccl. 610; *Barlee v. Barlee*, 1 Add. 305.) As to the second part of the replication, alleging the wilful separation of the respondent from the petitioner and his subsequent bigamous marriage, these facts are not sufficient to give her a domicile distinct from that of her husband. (*Dolphin v. Robins*, 6 House of Lords Cas. p. 390.) But even if she had acquired an English domicile, if Major Yelverton is not domiciled also in England, the maxim *Actor sequitur forum rei* applies, and the Court would therefore have no jurisdiction over him. [THE JUDGE ORDINARY: Has the

husband the power of depriving his wife of an English domicile by going abroad and leaving her? Suppose the husband of an English married woman, who had a right to dispose of certain property, notwithstanding her coverture, went to France and left her, which law would govern her will and the succession to this property?] They also cited *Chichester v. Donegal*, 6 Madd. 375, S. C. 1 Add. 5; *Hawkes v. Hawkes*, 1 Hagg. Eccl. 608; *Whitcomb v. Whitcomb*, 2 Curt. 357; Story's Conflict of Laws, ss. 537-538, 540-546; *Forbes v. Forbes*, 1 Kay, 341; *Bruce v. Bruce*, 2 Bos. & P. 229, n.; *Somerville v. Somerville*, 5 Ves. Jun. 750; *Sir C. Douglas's Case*, ib. 757; *Dalhousie v. M'Donall*, 7 Cl. & F. 817; *Brown v. Smith*, 15 Beav. 444; *Kennedy v. Cassalis*, 2 Swapst. 313; *Warrender v. Warrender*, 9 Bligh, 89, S. C. 2 Cl. & F. 488; *Grant v. Perrin*, 1 Wils. & Shaw, 716; *Tenducci's Case*, referred to 3 Phill. 595, and 3 Curt. 732; *Mostyn v. Fabrigas*, Cowp. 161; *Carden v. Carden*, 1 Curt. 558; *A. B. v. C. D.*, 2 Anderson's Court of Session Cases, 556; *Moncombe v. M'Leon*, Fergusson's Reports, 264.

1859.

December 7.

YELVERTON

v.

YELVERTON.

Dr. Phillimore, Q.C. (*Mr. Honyman* with him), for the petitioner: Facts which would be sufficient to constitute a domicile to found jurisdiction might not be sufficient to constitute a domicile for the purpose of succession. (*Croker v. Harford*, 4 More P. C. C. 366.) A man may have for different purposes several domicils at the same time. A temporary residence in a country is sufficient to found jurisdiction; although it will not confer a domicile for all purposes. Technically this is a suit for restitution of conjugal rights; but in this as in most cases of the same description, the real object is to obtain a declaration of the validity of the marriage. The respondent is a British subject, and even if the Court should come to the conclusion that he has no English domicile, nevertheless his conduct to his wife has been such as to give her the right of resorting to this Court, she having in fact a domicile by residence in this country; he has put her in the position of a *feme sole ad hanc litem*. When the wife is proceeded against by the husband he may assume that his domicile is hers, but can any case be shown where the wife proceeding has been held to have been barred of her

1859. December 7. **YELVERTON**
v.
YELVERTON. remedy because her domicil is inseparable from his? Again, does not the title which constitutes this Court give it wider jurisdiction than the Ecclesiastical Courts had? By the 6th section of the Divorce Act, a Court of Record is established; now in an inferior Court we admit that the *pars petens* must show that the jurisdiction is founded; but in a superior Court the party objecting to the jurisdiction must prove the absence of it. It is sufficient *primâ facie* if they are British subjects.

They also cited *Odwin v. Forbes*, quoted in the Appendix to Phillimore on Domicil; Fergusson's Consistory Reports; *Herbert v. Herbert*, 2 Consist. 271; *Carden v. Carden*, 1 Curt. 558; *Whitcomb v. Whitcomb*, 2 Curt. 351; *Collett v. Collett*, 3 Curt. 726, and the case of Tenducci there cited; *Dasent v. Dasent*, 1 Rob. 800; *Harteau v. Harteau*, 14 Pickering (American R.); *Mostyn v. Fabrigas*, Cowp. 161.

Cur. adv. vult.

December 7. **THE JUDGE ORDINARY:** This was a petition by Maria Theresa Yelverton, praying for restitution of conjugal rights.

The material facts alleged in the pleadings were in substance as follow:—The petitioner alleged that on or about the 13th of April, 1857, she was lawfully married to William Charles Yelverton (then and now a major in her Majesty's Royal Regiment of Artillery) at Edinburgh, in the kingdom of Scotland; that the marriage was valid according to the law of Scotland; that on the 15th of August, 1857, the petitioner was lawfully married to the said W. C. Yelverton, in the kingdom of Ireland, according to the rites of the Roman Catholic Church; that the petitioner afterwards lived and cohabited with her said husband in various places in Ireland, Edinburgh, Hull, and France, until April, 1858; that ever since June, 1858, W. C. Yelverton had, without just cause, refused to allow the petitioner to live or cohabit with him. The petition and citation were served in Edinburgh.

The respondent appeared under protest, and pleaded that he was at the commencement of the suit a major in the British army, and a captain in her Majesty's Royal Artillery stationed at Leith Fort, Edinburgh, in the kingdom of Scotland, and has since continued to be and still is resident at Edinburgh aforesaid, and that his domicil of origin is in the king-

dom of Ireland, and he has never abandoned such domicile or acquired any domicile elsewhere.

The petitioner replied, first, that before and at the commencement of the suit, both petitioner and respondent were subjects of the Queen; that in 1840 respondent, being fourteen years of age, left his father's house in Ireland and entered the Royal Academy at Woolwich as a cadet, and continued there till 1843, when he obtained a commission; that he has thenceforth continued on full pay, and that the headquarters of the regiment were and are at Woolwich, within the jurisdiction of this Court; that when respondent so left Ireland, he did so with the intention of not returning thither, and that he has not since resided in Ireland except for the purpose of visiting his father at his residence, and except when he went there for the sole purpose of being married to petitioner; that he had no land in Ireland; that on the 8th of June, 1859, he instituted a suit in the Court of Session against petitioner, and therein alleged that he was domiciled in Scotland.

Petitioner replied, secondly, that after her marriage to respondent they lived and cohabited together in Ireland, Edinburgh, Hull, and Bordeaux in the empire of France; that in April, 1858, respondent deserted her at Bordeaux and went to Edinburgh, and has ever since refused to live and cohabit with her as his wife; that at the time of the commencement of this suit she was and still is domiciled within the jurisdiction of this Court, to wit, at Maida Hill, in Middlesex.

The respondent rejoined, alleging that he did not leave Ireland in 1840 without any intention to return, but returned frequently and spent his vacations at his father's house there, and after he obtained his commission on several occasions had leave of absence from his company, and spent the time allowed him at his father's; that for two years before the commencement of this suit he was stationed at Leith, near Edinburgh, with his company, which is now the 7th battery of the 9th brigade; that the head-quarters of the brigade are at Dublin.

No answer to this rejoinder was brought in.

Upon these pleadings it appears that the fact of the respondent leaving Ireland without the intention to return is asserted on the one side and denied on the other, but no affidavit has

1859.

December 7.

YELVERTON

v.

YELVERTON.

1859.
December 7.
YELVERTON
v.
YELVERTON.

been brought in by either party as to that fact; and if it were material to the determination of the real question raised, it would be necessary that the truth or falsehood of that allegation should be ascertained. But it seems to me quite immaterial to consider whether a boy of the age of fourteen, coming over to this country for the purpose of receiving a military education, did or did not intend to return to Ireland.

The material facts established, then, appear to be these:—The respondent was born in Ireland of Irish parents, and when a minor received a military education in England, obtained a commission in the Royal Artillery, and was afterwards stationed at or near Edinburgh. When there he married in Scotland the petitioner, Maria Theresa, who is said to have been born at Chetwode, in Lancashire. The parties then went to Ireland, were remarried there according to the rites of the Roman Catholic Church, returned to Scotland, cohabited as man and wife there, at Hull, and afterwards at Bordeaux in France. That in April, 1858, respondent quitted petitioner at Bordeaux and returned to Edinburgh, where he has remained with his company ever since, and has constantly refused again to live or cohabit with petitioner. The headquarters of the regiment of Artillery have always been at Woolwich; the head-quarters of the different battalions—or, as they are now called, brigades—of the regiment were by general order of the 1st of April, 1859, removed from Woolwich and established at various places. The head-quarters of the brigade to which respondent has been attached have not since that time been in England.

The petitioner has asserted in her replication, that at the time of the commencement of the suit she was and still is domiciled in England, viz. in Middlesex. No affidavit has been brought in to support the allegation, but it has not been denied; if therefore she could by law be domiciled there, it may for the purpose of this question be taken as true.

With regard to this last point of domicile, it seems to me that the petitioner, who claims to be the wife of Major Yelverton, and who does not pretend that his domicile is in England on any other ground than that the head-quarters of the Regiment of Artillery are at Woolwich, cannot have acquired a domicile for herself different from his. The domicile of the

husband is the domicil of the wife; and even supposing him to have been guilty of such misconduct as would furnish her with a defence to a suit by him for restitution of conjugal rights, she could not on that ground acquire another domicil for herself, as was recently held by the House of Lords in *Dolphin v. Robins*.¹ I must therefore treat the case as if that assertion had not been made, or rather I must ascribe to it the only meaning which is consistent with the law, viz. that she was resident at Maida Hill.

On the argument before me a great deal of learning on the doctrine of domicil was displayed, and many cases were cited involving the consideration of it, and it was truly stated that the word domicil has many meanings, according as it is used with reference to succession or for determining rights of belligerents, or ascertaining trading privileges. The case now to be decided is certainly of much importance, and from the scope of the argument appeared to be involved in considerable difficulty. But upon reflection the point to be determined appears simple and easy of solution. It is unnecessary to consider the question of domicil for any of the purposes above mentioned, for Major Yelverton may have retained his domicil of origin for many purposes, and yet may have been domiciled in England, so as to give jurisdiction to this Court. Was he domiciled in England for the purpose of founding jurisdiction? He was not born in England—he was here for some time as a student when a minor; he afterwards passed some time (probably a very short time, for its duration is not mentioned) at Hull, removed thence to Bordeaux, and thence to Edinburgh, where he has remained ever since; he therefore cannot be said to have ever dwelt or had a residence in England since he obtained his commission, and the case as to domicil must rest upon the alleged legal fiction that he is supposed to be present at the head-quarters of the regiment of Artillery in which he has a company. No decision or *dictum* was cited to support that position, nor can I find any authority for it. If that ground fails, upon what other grounds can the petitioner's right to sue in this Court be sustained? It was established by an Act entitled "An Act to amend the law relating to Divorce and Matrimonial Causes in England;" it combines in

1859.

December 7.

YELVERTON

v.

YELVERTON.

¹ 6 H. of L. Cas. p. 390.

1859. itself "all jurisdiction previously vested in, or exercisable by,
 December 7. "any Ecclesiastical Court or person in England in respect of
 YELVERTON "divorces *à mensâ et thoro*, suits of nullity of marriage, suits
 v. "for restitution of conjugal rights," etc. It is a Court for
 YELVERTON. England, not for the United Kingdom, or for Great Britain;
 and for the purposes of this question of jurisdiction Ireland
 and Scotland are to be deemed foreign countries equally with
 France or Spain. If this be so, this is a suit against a fo-
 reigner, who is not, and was not, at the commencement of the
 suit, within the kingdom of England, who never had any resi-
 dence in England, who never owed obedience to the laws of
 England, except during the period of his temporary sojourn
 here, and who is not said to have done anything in England
 contrary to those laws. Story, in his Conflict of Laws, chapter
 on jurisdiction and remedies, sect. 539, says: "Considered in
 "an international point of view" (and so I think I must consi-
 der this case), "jurisdiction to be rightly exercised must be
 "founded either upon the person being within the territory, or
 "upon the thing being within the territory, for otherwise
 "there can be no sovereignty exerted upon the known maxim,
 "*extra territorium jus dicenti impune non paretur*." Boulle-
 nois puts this rule among his general principles: "The laws
 "of a sovereign rightfully extend over persons who are domi-
 "ciled within his territory and over property which is there
 "situate." Again in *Warrender v. Warrender*, 9 Bligh, 144,
 Lord Lyndhurst says: "The first point is the question of do-
 "micil; unless these parties were domiciled in Scotland, the
 "Court had no jurisdiction." Unless some ground can be
 discovered for saying that Major Yelverton was domiciled in
 England, according to the law as laid down by Lord Lynd-
 hurst, by Boullenois, and by Story, he was not subject to the
 jurisdiction of this Court. It was said, indeed, that jurisdic-
 tion was given by the 47th section of the Act, by the autho-
 rity of which the Court exists, viz.: "Every such petition shall
 "be served on the party affected thereby, either within or
 "without her Majesty's dominions, in such manner as the
 "Court shall direct." That section certainly relieves the
 Court from all difficulty as to serving process on the party ac-
 cused; but assumes, as I apprehend, that the party to be
 served is subject to the jurisdiction of the Court. Of all the

cases cited at the bar, three only bear any such resemblance to the present as make it necessary to notice them: *Tenducci's* case, in 1775; *Collett v. Collett*, 3 Curt.; and *Dasent v. Dasent*, 1 Robert.

Tenducci's case is in many respects very remarkable. Dr. Lushington has on two occasions mentioned it as having been decided in the Arches, and therefore of great authority. (See *Collett v. Collett*, 3 Curt. 731; and *Dasent v. Dasent*, 1 Robert. 802.) Dr. Twiss has kindly had the original papers looked up, and from them I find that the cause was in the Consistory Court; no trace of any appeal or other proceeding in the Arches can be found. The first citation issued on the 15th of January, 1774, to cite Fernando Tenducci, of the parish of St. Martin's-in-the-Fields, in the county of Middlesex, and our diocese of London, etc. etc., to answer to Dorothea Kingsman, wife of W. L. Kingsman, Esq., in the parish of St. James's, Westminster, in the county of Middlesex, in a certain cause of nullity of marriage by reason of impotency, etc. This citation was returned into Court on the 20th of January, with the certificate of the officer, "that on the 18th and 20th of January he went to the dwelling-house of Nicoll and Miller, No. 7, corner of Suffolk-street, in the parish of St. Martin's-in-the-Fields, in the county of Middlesex, where the within-named F. Tenducci usually lodged when in England, and which was his last known place of abode, and was there informed that the said F. Tenducci had left his said lodging about eighteen months ago, and was gone out of the kingdom, and was supposed to be residing at that time in some part of Italy." Nothing further was done upon that citation, but on the 18th of June another citation issued against Tenducci (described as before) to answer Dorothea Kingsman, the wife of W. L. Kingsman, formerly Maunsell, falsely called Tenducci, in a certain cause of nullity of marriage by reason of impotency; the only difference being in the descriptions of the party complaining. The return of the officer was as follows:—"I went three times to the Theatre Coffee-house, situate in the Haymarket, in the parish of St. Martin-in-the-Fields, county of Middlesex, and also to the dwelling-house of Messrs. Nicoll and Miller, No. 7, same street, parish, and county, which was the last known usual place of abode of F. Tenducci, as I was informed; and that

1859.

December 7.

YELVERTON

v.

YELVERTON.

1859.
December 7.
YELVERTON
v.
YELVERTON.

"I went to such places at the before-mentioned times in order to have served him personally with this citation, but could not find him: and then I was informed at the said Theatre Coffee-house by several persons that the said F. Tenducci was at this time in Italy, as they believed, but at what particular place they could not tell; and I was also informed at the house of Nicoll and Miller that the said F. Tenducci was at Florence, and when he would return to England they knew not." The difference in the two returns is remarkable. The first says, that Tenducci usually lodged at Nicoll and Miller's when in England, and that it was his last known place of abode. The return to the second describes Nicoll and Miller's as his last known usual place of abode, and omits "when in England." The first return proceeds to state that he had left his lodgings eighteen months ago, and gone out of England; the second, that he could not be found at Nicoll and Miller's, and was said to be then in Florence, and that it was not known when he would return. Now I cannot help suspecting that the return to the first citation showed too much, and therefore a second citation was issued, the return to which merely showed that the last known usual place of abode of Tenducci was at Nicoll and Miller's, and that he was, when service was attempted, said to be at Florence, and that it was not known when he would return; from which it would be implied that he was expected to return to his usual place of abode. On the 28th of June a decree issued for citing Tenducci by ways and means, which was executed in the usual manner, and a copy was delivered to him personally, at Naples, on the 24th of September in the same year. A libel was given in on the 24th of May, 1775, the 15th article of which was in these words: "Item. That the last place of residence of the said F. Tenducci, party in this cause, when in England, was within the parish of St. Martin's-in-the-Fields, in the county of Middlesex and diocese of London, and by reason thereof he was, and is, subject to the jurisdiction of the Court," etc. It appears, then, that the attempt to serve him was at his last known and usual place of abode; that he was in Florence when that attempt was made, and that it was not known when he would return; and the jurisdiction was pleaded in the terms just mentioned. Tenducci never ap-

peared to gainsay any part of this, or to controvert the jurisdiction.

In *Carden v. Carden*, 1 Curt. 558, Dr. Lushington explained the ground upon which the Ecclesiastical Court proceeded in exercising jurisdiction under such circumstances. He there says: "There is nothing here to show that the party proceeded against ever had any residence in the diocese; if you fix his residence before the citation issues, the Court will presume a continuance until the contrary be shown. Upon an affidavit being brought in that the party had his residence in London before the service of the citation, the Court may proceed with the cause."

Again, in *Collett v. Collett*, 3 Curt. 726, another case relied on by the petitioner, it appeared that the party cited not only had a residence in London, which he still retained, but that he did not quit it until after the citation issued; and that the only question in that case was whether the Court could proceed, the citation having been served personally on the party at Malines, and not by ways and means; but there is a passage in this judgment worthy of notice as applicable to the question of residence: "The Court always looks, on a question of jurisdiction, to the statute of Henry VIII., which was passed in affirmance of the common law, and by which this Court, among others, had local limits assigned to it. That statute is the document by which this Court must be governed in these proceedings; it was passed for the purpose of preventing abuses which took place by reason of the process to appear in the Arches and other Ecclesiastical Courts being served on a party far from and out of the diocese where the party cited dwelt (these words are of some importance)—not where the party might happen to be at the period of issuing the citation, but out of the diocese where he dwelt. No doubt the word 'dwell' means a permanent dwelling. In no other part of the statute are there any words to give a different meaning to the words I have cited; and in the enactment the words are, 'that no manner of person shall be cited or called to appear out of the diocese wherein he shall be inhabiting at the time of the awarding or going forth of the citation.' Undoubtedly the word 'inhabit' is here used in precisely the same sense as the word 'dwell' in the prior part of the statute."

1859.

December 7.

YELVERTON
v.
YELVERTON.

1859.
December 7.
YELVERTON
v.
YELVERTON.

It remains for me to notice the case of *Dasent v. Dasent*, 1 Rob. 800, mentioned to the Court by Dr. Phillimore after the argument. It approaches more nearly than any other that has been found to the present case. A citation was issued by the wife against the husband, describing him as of the parish of St. James's, Westminster. The officer certified that he had attended at 11, Pall Mall, in the parish of St. James's, Westminster, the last known place of residence of Mr. Dasent, for the purpose of serving the citation on him personally; that he was informed that he had left his residence, and that it was not known there where he was at that time, but it was reported that he had left England and was in the West Indies. A decree by ways and means was then issued and executed in the usual manner, and on the 21st of April, 1849, the citation was brought in personally served on Mr. Dasent at Kingston, in the island of St. Vincent, on the 5th of February preceding. The wife made an affidavit as to the misconduct of her husband, showing gross ill-treatment in England, but in which, amongst other things, it was stated that in March, 1847, he left England and went to the island of St. Vincent, and had resided there ever since. Upon that affidavit an application was made to the Court to pronounce the husband in contempt, for the purpose of proceeding in order to put upon the record proof of the cruelty and adultery; and subsequently, on sentence being prayed, the report is in these words: "The Court observed that the only obstacle in the way was the matter of the jurisdiction, but said, I have fully considered that question, and I think it right I should pronounce for a divorce."

The ground upon which that very learned person held that the Court had jurisdiction is not explained. Had he stated any rule or legal principle which would have been applicable to this case, I should certainly have held myself bound by it; but the report not throwing any such light upon the case, I can only take it as an authority where the circumstances are precisely similar: which cannot be said of the case now before the Court. Major Yelverton is not an Englishman, he never had a residence in England, nor was he ever guilty of any misconduct towards the plaintiff in England; and from the passage which I have read from the report of *Carden v. Carden*, 1 Curt., I infer that Dr. Lushington would have held that

there was no jurisdiction, unless evidence had been given of some residence in England. That foundation was laid in every case that was cited, and I cannot treat any one of them as an authority for overruling Major Yelverton's protest.

One other point was made for the plaintiff, viz. that she before and at the time when the citation issued was domiciled in England. I have already stated that in my opinion she could not, as a married woman, acquire a domicile recognized by the law other than that of her husband. But she may actually reside in a different country, and construing her replication as an assertion that she was living in England, I presume it was introduced for the purpose of bringing before the Court the American decision in *Harteau v. Harteau*, 14 Pick. American Reports, cited in Bishop on Marriage and Divorce, where it was held that a wife who was resident in one of the United States might sue there for a divorce although her husband was resident in a different State. The subject is pretty fully discussed in Bishop on Marriage and Divorce, and the privilege there allowed the wife appears to have been founded on principles quite inapplicable to this case, viz. that the party suing (whether husband or wife) must, before suit, reside for a certain time in the State where it is instituted; and therefore if a wife were bound to follow her husband to sue him where he resides, he could always defeat her suit by changing his residence before she could commence it. Another ground was, that the wife then contended that by her husband's delinquency she had a right to be released from the marriage tie; whereas here she is seeking to enforce it. There is nothing, then, in this American decision to get rid of the maxim relied on by the counsel for the respondent, *Actor sequitur forum rei*. I must therefore sustain the protest and dismiss Major Yelverton.

1859.
December 7.
YELVERTON
v.
YELVERTON.

(Before the JUDGE ORDINARY.)

WHITE v. WHITE.

Judicial Separation.—Cruelty of the Wife.

The husband will be entitled to the protection of the Court, where the

December 7.
WHITE
v.
WHITE.

1859.
December 7.
—
WHITE
v.
WHITE.

wife's passions, from whatever cause, are so little under control that she is in the habit of using personal violence to the husband, from which habit he may be in danger of bodily injury, though no actual serious injury has been inflicted.

This was a petition for judicial separation, at the suit of the husband, by reason of the wife's cruelty. It appeared that she was easily excited by drink, and in that condition had frequently used personal violence towards her husband. She had also, at times, been in confinement as insane.

The case was argued, in the sittings after Trinity Term, by *Dr. Spinks* (*Mr. Pritchard* with him) for the petitioner.

Mr. Mundell (*Mr. G. H. Cooper* with him) for the respondent.
Cur. adv. vult.

December 7. THE JUDGE ORDINARY gave judgment: I have had considerable difficulty in satisfying my mind as to the decree which should be pronounced in this case.

The principles upon which the Court should proceed are plain enough. They were distinctly stated by Lord Stowell in *Evans v. Evans*, where the wife was petitioner; and again in *Kirkman v. Kirkman*, 1 Cons. 409, where the husband sought the protection of the Court. In that case Lord Stowell observed: "The persons of both parties must be protected from violence; and I cannot accede to what has been said in argument, that the Court should not interfere till there has been actual violence of such a nature as to endanger life. It is not to pause till a tragical event has taken place; . . . it is perfectly clear that there have been words of menace with acts of violence accompanying them. It is said that they were caused by jealousy. All the evidence tends to establish that there was no foundation in the conduct of the husband for feelings of that nature. If such feelings were entertained, with or without reason, jealousy is a passion producing effects as violent as any other passion, and there will be the same necessity to provide for the safety and comfort of the individual. If that safety is endangered by violent and disorderly affections of the mind, it is the same in its effects as if it proceeded from malignity alone; it cannot be necessary that, in order to obtain the protection of the Court, it should be made to appear to proceed from malignity."

In the case now before the Court it appeared that on many occasions, the husband had been assaulted by his wife, and had resorted with success to a magistrate for protection : the extent of the injury done to him was not fully explained ; but on one or two occasions the assaults appeared to be of a somewhat serious character. Her demeanour was shown to have been very violent on many occasions, but that violence sometimes expended itself in the destruction of her husband's property rather than in injury to his person. The unhappy woman had been several times in confinement as an insane person, and I have found it no easy task to judge how much of her violence towards her husband was to be ascribed to disease of the mind. Her own account of the manner in which the disputes between her and her husband arose was apparently very candid, and perhaps the safest on which the Court can act. According to her evidence she was in the habit of going out and drinking spirits, not in large quantities, but sufficient to act upon a very excitable temperament. Then she and her husband began to dispute about trifles ; she became gradually more and more excited until she lost her self-control, and then committed the violent acts complained of. These quarrels, which occurred frequently, appear in several instances to have preceded an attack of insanity, under which, as already observed, the unfortunate woman has several times laboured.

As far as I can judge from the evidence given, I suppose those attacks to have been the consequence, and not the cause, of her intemperance and the quarrels with her husband. The assaults committed upon him were not proved to have been productive of any serious bodily injury ; but where a woman, either from the effects of drinking or any other cause, is entirely without the power of controlling her passion, and in such a state of mind is in the habit of assaulting her husband, it is impossible to say that he is not in such danger of bodily injury as entitles him to the protection of the Court. I therefore feel bound to pronounce a decree of judicial separation.

Mr. Mundell then prayed the Court to make some provision for the wife by an order for permanent alimony. There were but two cases reported in which a divorce *à mensâ et thoro* had been pronounced at the suit of the husband for cruelty, so

1859.
December 7.
—
WHITE
v.
WHITE.

1859. that there could not be said to be any precedent against
 December 7. what was now asked. It was clear that the considerations
 WHITE which might have founded the rule of the Ecclesiastical
 v. Courts to make no order for alimony when the divorce was
 WHITE. granted by reason of the wife's adultery, did not apply to
 such cases as the present.

But the Court, in absence of any precedent in support of
 the application, refused to make any order.

1860.
 January 11.

(Before the JUDGE ORDINARY.)

ANTHONY v. ANTHONY.

ANTHONY
 v.
 ANTHONY.

Judicial Separation.—Cruelty.—Jealousy.

On the wife's petition for judicial separation by reason of her husband's cruelty towards her, certain acts of violence on his part being admitted which took place in disputes between the parties arising at least in part out of the wife's jealousy of a maid-servant, the Court took into consideration the position in which the wife was placed in the family by reason of any authority or control exercised over her by the servants by the direction of the husband, and the state of the wife's feelings arising from reasonable suspicion of undue familiarity between the husband and a maid-servant.

This was a petition for a judicial separation, at the suit of the wife, by reason of the husband's cruelty. Some of the circumstances are peculiar, but are sufficiently set out in the judgment. The petition also prayed that the custody of the youngest child should be given to the mother.

The case was heard before the JUDGE ORDINARY on the 19th and 20th of December.

Dr. Spinks and *Mr. D. Keane*, for the petitioner.

Dr. Deane, Q.C., and *Dr. Swabey*, for the respondent.

Cur. adv. vult.

On the 11th of January THE JUDGE ORDINARY gave judgment: The petitioner in this case asked for a decree of judicial separation on the ground that her husband had been

guilty of cruelty. The respondent denied the cruelty alleged. The case was heard without a jury.

1860.
January 11.

ANTHONY
v.
ANTHONY.

It appeared in evidence that the parties were married in 1846, and had three children, born in 1849, 1851, and 1853. Until 1851 they appeared to have lived happily together. In that year a young woman, named Emma Bennett, came into their service, and not long afterwards disputes arose about domestic matters between the petitioner and her husband. It is very difficult, and in this case not very important, to decide which was in fault—probably both were; but the decree of the Court will not be founded on such disputes. Before the youngest child was born the respondent had ceased to occupy habitually the same bedroom with his wife, and slept in an apartment adjoining Emma Bennett's, of whom the petitioner became very jealous, which the respondent perfectly well knew. Thus in the spring of 1853, not long after her confinement, she saw, or fancied she saw, Emma Bennett sitting on her husband's knee, and immediately accused them of it. Emma Bennett denied here that she had done so. The respondent was not asked the question, and said nothing about it. On another occasion the petitioner hearing some noise in her husband's room, which was over hers, went upstairs, and, as she alleged, saw him coming out of Emma Bennett's room. Both Emma Bennett and the respondent denied that he had been there, but the respondent stated that he was not in his own bedroom, but had gone into his own dressingroom on the opposite side of the passage. I am not convinced that he had been in Emma Bennett's room, but certainly the petitioner had under the circumstances reasonable ground for suspicion, of which the respondent must have been conscious, and he should have been careful not to treat Emma Bennett in a manner to excite and injure her feelings.

Such being the state of feeling between them, a dispute arose which led to an act of violence on his part of a very serious character, and which he did not deny. The accounts given of it vary, and it may be worth while to examine them all, as they tend to show the spirit of partisanship in which some of the evidence was certainly given before me. It was not probable that harmony would be restored to that house, espe-

1860.
January 11.
ANTHONY
v.
ANTHONY.

cially if Emma Bennett remained in it; but the respondent refused to discharge her. Another person, Lucy Bayliss, was hired in 1853 to act as nurse. The respondent, an artist by profession, was sometimes absent from home for a time, and afterwards complained that wine and other things had been consumed or sent away during his absence: the petitioner said the servants must have taken them. They, on the contrary, accused her of having taken or sent them to her relations, and the respondent appeared to place most confidence in the statements of his servants, which kept up in the petitioner a very excited state of feeling. In the course of the spring of 1855 this increased to such a degree, that it was necessary to consult a medical man, Dr. Norton, who deposed that he found her in a very excited state, insomuch that he thought she could not safely be left alone, and upon questioning her as to the cause, she ascribed it to the treatment which she met with from the servants by her husband's directions. The respondent then said it was occasioned by intemperance, to which Dr. Norton replied, "Certainly not; it 'evidently arose from trouble of mind.'" In August of the same year 1855, another instance of actual violence, not denied by the respondent, occurred. The dispute commenced about a trifle, viz. the number of towels that he had used in his studio. The petitioner mentioned a certain number; he appealed to Emma Bennett to know whether it was true. The petitioner complained of his trying to make her appear a liar to his own servants; whereupon he threw a jug of cold water over her, filled it again, and again emptied it upon her; she struggled to take the jug from him; it was broken, and her finger cut, and in the end he struck her a violent blow with his fist; she said it nearly stunned her. He admitted that it might be a blow upon the head. He then stated that he never struck her afterwards; she says that he did, and as he had, by his own confession, been guilty of two such acts of violence it seems not improbable that he might again lose his self-control, when we consider the temper that he manifested towards her in the autumn of 1855. At the close of 1855 the other servant, Lucy Bayliss, was discharged, she says because the petitioner stated that she would take care of the children. The real nature of the transaction appears from

the letters that passed after the petitioner left her home, but it is not very material. The petitioner says that early in 1856 the respondent struck her with a maul-stick for asking him to part with Emma Bennett ; he denied it.

Whatever may be the truth, there can be no doubt that it was very galling to petitioner to be left in the house with Emma Bennett, whom she knew to be in many respects preferred to her. The respondent indeed said, that from January to October, 1856, he and his wife were on good terms, but I cannot reconcile that statement with what he asserted with reference to the transaction which was the immediate cause of her leaving the house. In September and October, 1856, he was absent for several weeks, occupied in professional pursuits at Burnham ; during that time the petitioner found that Emma Bennett took possession of her letters, and assuming that her husband had authorized her to do so, felt so much the degradation of her position that she took her two younger children and went with them to her husband's sister, Mrs. Lewis, and thence to lodgings at Kentish-town. The respondent's mother went to her there, and afterwards took her son there, and endeavoured to effect a reconciliation ; the petitioner insisted on Emma Bennett's dismissal before she returned ; the respondent promised to dismiss her when she had returned, and not before ; the petitioner would not trust to that. The letters that passed show that, with regard to the manner in which Emma Bennett had been instructed to treat her, the respondent was not sincere ; they are at variance with that which he stated in Court on his oath ; the petitioner was therefore right in supposing that Emma Bennett took her letters by his orders, and bearing in mind that on two occasions at least disputes had arisen out of her jealousy of Emma Bennett, which terminated in her being severely beaten, no one can be surprised that she refused to return home again to live in the same house with that person ; what could be more probable than that other disputes would arise and produce similar consequences ? After this the respondent took away the eldest of the two children by force, and asked a police-constable to take his wife into custody on a charge of having stolen certain articles which she took from his house with her ; the police-constable, of course, refused to

1860.
January 11.
ANTHONY
v.
ANTHONY.

1860.
January 11.
—
ANTHONY
v.
ANTHONY.

take such a charge, but in making it the respondent showed anything but a disposition to treat his wife with gentleness and forbearance. Proceedings were commenced by her in the Old Court, dropped on some proposed arrangement which was never completed, but an allowance had been made her up to this time.

What answer then is given to the petitioner's case? Condonation is not pleaded, nor proved; the evidence negated it, for the respondent stated that from 1855 he had refused to recognize her as a wife, and that he would adhere to that resolution. Nothing satisfies the Court that the real ground of this proceeding is other than that which is alleged in the petition. I pronounce for the separation. As to the custody of the child, I cannot now finally dispose of that question, but she will remain with the mother till further order.

January 20.
—
Y—
v.
Y—.

(*Before the Full Court*,—THE JUDGE ORDINARY, HILL, J., and
KEATING, J.)

Y— v. Y—.

Petition for Dissolution.—Application to intervene.—Practice.

Y. petitioned for a dissolution of her marriage on the ground of her husband's desertion and adultery; he did not appear to the citation. D., having no legal private interest, prayed to be allowed to prove at the hearing that Y. had herself been guilty of adultery. The Court

Held, that neither the Divorce Act, nor the rules and orders made under its provisions, gave the Court any authority to admit such intervention, but refused to direct the affidavits on which the motion was founded to be removed from the file, or to give the costs of appearing to show cause in the first instance.

Dr. Phillimore, Q.C., moved the Court: In this case a wife has instituted a suit for dissolution of marriage against her husband, on the ground of his desertion and adultery; the husband has entered no appearance, so that, as matters now stand, the petition will be determined merely on the evidence adduced by the wife. I now apply to your Lordships on be-

half of D., who has no private interest of a legal character, but prays that at the hearing he may be allowed to adduce evidence that the wife is suppressing the fact that she is an adulteress. Assuming the truth of D.'s statement, unless this intervention is allowed, there will be a material fact unknown, which, if before the Court, might influence its decision. In civil suits in the Ecclesiastical Court no doubt third parties were only allowed to intervene *pro interesse suo*; but these matrimonial causes are of such general interest that it might be a question whether a third party ought not to be admitted *pro interesse publico*. A decree of the Court obtained by fraud and collusion would be liable to be set aside. (*Duchess of Kingston's case*, Smith's L.C.) The Court hears suggestions made by counsel as *amicus curiæ*. [HILL, J.: Can you mention any case in which an *amicus curiæ* has been allowed to suggest a fact not raised by the issues to be tried?] I cannot. The party for whom I apply offers a guarantee for costs, if he fails to prove his allegations.

1860.
January 20.
Y—
v.
Y—.

Mr. M. Chambers, Q.C. (Dr. Waddilove with him), contra, was not called on.

THE JUDGE ORDINARY: The Court is of opinion that the application cannot be granted.

As far as proceedings for a judicial separation are concerned, the Court is directed to follow the principles of the Ecclesiastical Courts. This is not a case of that description; and if it were, it was admitted by counsel that no third party was allowed to intervene unless *pro interesse suo*. But the authority of the Court in a petition for dissolution is new, and depends on the words of the Act by which it is constituted; under that Act certain rules have been drawn up which make no provision whatever for such a proceeding. The forms provided are for the petitioner, respondent, and co-respondent; we have no authority under these to allow such an intervention. The 29th section directs the Court to satisfy itself not only as to the facts alleged, but also whether or no the petitioner has been in any manner accessory to or conniving at the adultery, or has condoned the same; and to inquire into any countercharge which may be made against the petitioner.

1860.
January 20.

Y—
v.
Y—.

There may be some difficulty in ascertaining the meaning of the last part of the section ; it may, however, relate to the matters mentioned in the second branch of the 31st section as raising a case for the discretion of the Court in granting or refusing a decree of dissolution ; certain matters may be pleaded in bar under the 30th section, but the countercharge of cruelty or adultery, *e.g.* would raise a case for the discretion of the Court. There is no direction in the 29th section to inquire into collusion, but the 30th section says, if the Court shall find that the petition is presented or prosecuted in collusion with either of the respondents, then it shall dismiss the petition ; not a word having been said before as to any inquiry into collusion.

In these sections we find no authority to do what we are now asked, and, if we thought we had the power, it is one we should be very reluctant to exercise. To allow third persons to intervene as a matter of right, and say that one of the original parties is guilty of conduct not imputed by the other, might lead to most dangerous consequences ; false charges might be made from various interested motives, or, as a blind to the Court, a charge might be brought on purpose to fail on the evidence. If the suspicions of the Court are aroused in the progress of a cause, it has jurisdiction to summon parties before it and examine them. It did so lately in the case of *Lloyd v. Lloyd and Chichester* ;¹ but there the Court's attention was directed to information which the officer of the Court became possessed of in the ordinary discharge of the business of the Court.

Mr. M. Chambers prayed the Court to direct that the petition of D., and the affidavits in support of it, should be taken off the files of the Court ; he also asked for costs of appearing to show cause.

THE COURT refused to make either order, observing, as to costs, that they were never given on an application rejected when cause was shown in the first instance.

¹ Ante, p. 567.

(Before the Full Court and a Common Jury.)

PEARMAN v. PEARMAN AND BURGESS.

*Adultery of the Wife.—Cruelty of the Husband.—20 & 21
Vict. c. 85, s. 31.*

1860.

January 20.

PEARMAN
v.
PEARMAN AND
BURGESS.

On the petition of the husband, the wife's adultery and his cruelty being in issue, the jury by their verdict affirmed both the adultery and cruelty; but as it appeared in evidence that the wife's drunken habits were the probable cause of the husband's violence, the Court exercised the discretion given it by the 31st section of the Divorce Act, by dissolving the marriage. The drunken violence of the wife would only justify such force on the part of the husband as might be necessary for her restraint.

This was a petition for dissolution of marriage at suit of the husband, by reason of the wife's adultery with the co-respondent, his apprentice. The respondent and co-respondent denied the adultery, and the respondent alleged cruelty as against the husband, and prayed for a judicial separation. The issues of adultery and cruelty were now tried by a common jury.

Mr. Huddleston, Q.C., and Mr. Pulling for the petitioner.

Mr. Serjeant Pigott and Dr. Wambey for the respondent.

Mr. Garth for the co-respondent.

In the course of the evidence it was clearly proved that Mrs. Pearman, who was the wife of a druggist at Stourbridge, had given way to drink to a considerable extent; there was also direct evidence of considerable violence used by the husband towards the wife.

THE JUDGE ORDINARY, in summing up to the jury, observed: If a woman gets drunk and loses her self-possession, and makes use of personal violence towards her husband, or destroys his property, he may use some force or violence if he cannot otherwise restrain her; if she comes drunk into his shop, he may take her by the shoulders and turn her out, but

1860. to follow after her and beat her is inexcusable: there is no
January 20. law authorizing a man to beat his drunken wife.

PEARMAN
v.
PEARMAN AND
BURGESS.

The jury, after deliberating for upwards of an hour, found a verdict of adultery against the wife and of cruelty against the husband.

THE JUDGE ORDINARY: As the jury have found that the petitioner has proved his charge of adultery, and also that he has been guilty of cruelty, the Court has now to exercise the discretion given it by the 31st section. If there were reason to believe that the misconduct of the wife had been caused by the misconduct of the husband, it would have exercised that discretion by refusing a decree for dissolution of marriage; but it rather appears that the wife's drunken habits were the cause of the cruelty of which the jury have found the husband guilty. We think, under these circumstances, that we ought to make a decree for dissolution of the marriage, and with costs against the co-respondent.

January 25.

(Before the JUDGE ORDINARY, on Motion.)

HOOPER
v.
HOOPER.

HOOPER v. HOOPER.

Petition of Wife on ground of Cruelty.—Record withdrawn by consent.—Motion to set Cause down again for Trial.

Before the trial of certain issues arising out of a wife's petition for judicial separation by reason of her husband's cruelty, an arrangement was entered into and a memorandum signed by the counsel of both parties before the jury were sworn, enabling a referee to settle the terms of a separation by deed, with full power over the question of income. Subsequently the wife moved to re-enter the record and set the case down for hearing. The Court refused the motion, holding the wife bound by the agreement that the proceedings should be stayed, and the suit not moved, so long as she could show no breach of the terms of the agreement by the other party.

This was originally a petition by the wife for a judicial separation by reason of her husband's cruelty. The case came

on for hearing before the Judge Ordinary and a special jury on the 16th of June, 1859. Before the jury were sworn, counsel on either side stated that they had advised their respective clients that the differences between them had better be made the subject of private arrangement, and that Mr. and Mrs. Hooper had agreed to this suggestion. Accordingly the jury were dismissed, and the following memorandum of agreement was drawn up:—

“In the Divorce Court, *Hooper v. Hooper*: record withdrawn, proceedings to be stayed, and the suit not moved; “Mr. Hooper paying the present alimony of £250 per annum ordered by the Court, and agreeing to add thereto £50 per annum. Mr. Brabant to be requested to settle the terms of a separation by deed, with full power over the question of income.

“ (Signed) “K. MACAULAY,
“MONTAGUE SMITH.”

There was some delay in bringing the matter before Mr. Brabant. In the course of December the agents of both parties met before him, when Mrs. Hooper's solicitor seems to have expected Mr. Brabant to go into the question of cruelty, alleging that the intention of the reference was to substitute Mr. Brabant for the Court, and that the question of cruelty or no cruelty might have a bearing upon the amount of income. He also urged that Mr. Hooper should pay Mrs. Hooper's costs as between solicitor and client. Mr. Hooper's proctor urged, on the contrary, that Mr. Brabant's duty was to arrange the terms of a separation, without going into the previous conduct of the parties. Mr. Brabant apparently took this view of his authority, and, under the circumstances, considered that he could proceed no further in the matter, and so informed them.

Mr. Wilde, Q.C., now moved the Court for leave to re-enter the record, and have the cause set down for trial. He relied on *Hayward v. Hayward*, ante, 333.

Mr. M. Smith, Q.C., *contra*.

THE JUDGE ORDINARY: I think there is a distinction be-

1860.
January 25.
HOOPER
v.
HOOPER.

1860.
January 25.
HOOPER
v.
HOOPER.

tween the present case and that of *Hayward v. Hayward*. Here the parties have agreed that the record should be withdrawn, proceedings stayed, and the suit not further moved; there the case was *adjourned* on the representation of counsel that an agreement out of Court had been, or would be, arranged. One of the parties refused to abide by that agreement, and the cause simply remained on the books, as it was before, unheard; here the cause remains on the books subject to an agreement made in Court that the suit should not be moved any further. I am of opinion that I ought not to grant the application. I have been referring to the statute to see whether the party will have an opportunity of appealing, otherwise I might have taken further time to consider the course I should pursue; but I find Mrs. Hooper may appeal, if she is so advised.

I think it is of the last importance that parties who come before the Court with their eyes open, and agree to pursue a particular course of action, that course being confirmed by an order of the Court, should not be permitted to treat the Court with contempt by afterwards refusing to perform it. Parties make their agreement by the advice of counsel at the time; afterwards, because perhaps some one suggests that they might have made a better bargain, they endeavour to get rid of their agreement.

It is impossible to read the statements of the parties in this matter without seeing that there has been an attempt to bring before Mr. Brabant matters which were never intended to be submitted to him, in order to get rid of the agreement which was made in this Court. Mrs. Hooper undertook at the time, as to this suit, that it should not be moved; that suit was not referred to Mr. Brabant, there was not a syllable as to the suit or all matters in difference being referred to Mr. Brabant; no term of that kind was used: neither was there anything like a stipulation that the costs as between solicitor and client should be paid by Mr. Hooper; and that appears to have been one of the matters most strenuously contended for by Mr. Clarke in his endeavours to get the whole matter heard by Mr. Brabant; therefore I think that the lady, having consented that the suit should be no further prosecuted (for that is the meaning of these terms), and not alleging that the

other party has attempted to deprive her of the benefit of any- 1860.
thing he undertook to give at that time, I ought not to allow January 25.
this cause to be set down again for hearing.

I consider it a very important point, and shall be very glad
to have it finally settled by the full Court, in order that I may
know hereafter whether agreements proposed and entered into
deliberately and advisedly are afterwards to be treated as a
nullity, and all the expense to be thrown away, the unfortu-
nate husband, when his wife is the contending party on the
other side, being burthened with the costs of the whole pro-
ceedings.

Motion rejected.

HOOPER
v.
HOOPER.

(*Before the Full Court*,—THE JUDGE ORDINARY, WILLIAMS, J., and
BRAMWELL, B.)

H— (falsely called C—) v. C—.

*Petition for Nullity of Marriage by reason of the Husband's
alleged Impotence.—Lapse of Time and other Circumstances.
—Practice.*

1860.
February 2.

H—
(falsely called
C—)
v.
C—)

B. and C. intermarried in 1834 and lived together till 1838, but the
marriage was never consummated. About ten months after mar-
riage the wife accused the husband of want of confidence in not
having told her that he was unable to consummate the marriage.
He subsequently consulted a medical man, as also did the wife three
weeks later, but without any change in his condition. In 1838
her father and mother spoke to him on the subject, upon which he
left the house, and refused to live with her again. From the year
1838 to 1854 the wife maintained herself by her own exertions. In
November, 1838, she attempted to effect a reconciliation: and be-
tween that date and 1854 she frequently importuned the husband to
take her back to live with him. In 1849 she was obliged to take
medical advice, and the remedies employed were such as to destroy
the usual marks of virginity. This medical man's account of her
then condition was the only evidence of that nature offered at the
hearing. In 1854 she being ill was unable to maintain herself;
her husband, on being applied to, refused to give her any assist-
ance, and she thereupon by the advice of her solicitor contracted
debts, and caused him to be sued as her husband for payment of
them; these proceedings ended in his allowing her £80 per annum.
In 1858 this was reduced, and soon after the petition for nullity was

1860. filed; the respondent did not appear, and no monition on him to
 February 2. submit to personal medical inspection was extracted:
 ———
 H— HELD, by the Judge Ordinary, and Williams, J. (*dissentiente* Bramwell,
 (falsely called B.), that the lapse of time and other circumstances of the case disen-
 C— titled the petitioner to a decree of nullity of marriage.
 v. The Court has no power to hear any case with closed doors.
 H— SEMBLE, there is no reported case of any authority in the Ecclesiastical
 Courts where such a decree has been made, without a monition on
 the other party to submit to personal inspection having been at least
 extracted.

This was a petition for a decree of nullity of marriage by reason of the husband's impotency. The citation had been personally served on the respondent, but no appearance had been given for him, and the case now came on for proof of the petition.

1859. *Dr. Deane*, Q.C. (*Dr. Spinks* with him), for the petitioner,
 Nov. 14 & 15. asked the Court to hear the evidence in this case *in camera*.

THE JUDGE ORDINARY: My own impression on the point I have already had occasion to mention, viz. that we have no power to hear any case otherwise than in open Court; but, as I now have the advantage of the assistance of my learned brothers, I will confer with them.

WILLIAMS, J., and BRAMWELL, B., after consultation with the Judge Ordinary, gave their opinions to the effect that the Court had no power to sit otherwise than with open doors.

THE COURT then inquired of counsel whether there was any case in the Ecclesiastical Courts where such a suit had been maintained without a monition upon the party proceeded against to submit to personal medical inspection.

Dr. Deane admitted that there was no case to that extent, out such a decree had been pronounced when the service of the monition had been evaded or compliance with it refused. The Court would act on the best evidence which the nature of the case admitted, and that would be proof of the virginity of the woman at the time when the cohabitation ceased. In the present case the cohabitation of the parties had ceased

in 1838, and however the Court might have been assisted by the report of medical men after an inspection of the husband's person then, it could be of little consequence now. Again, the rule of the Ecclesiastical Courts sprang up before the parties to a suit could give evidence. At the utmost it is a mode of proof which the wife may take advantage of or waive at her discretion.

1860.
February 2.
H—
(falsely called
C—)
v.
C—.

Cur. adv. vult.

On November 15, *Dr. Deane* referred to the case of *G— v. R—*, decided in the Commissary Court of Surrey, 1854, where, so far as appeared from the minutes of the proceedings, the monition on the husband was decreed, but not extracted, and consequently not served.

BY THE COURT: We think the proper course to be taken is this, that we should hear your case on the evidence with which you are now prepared. Then two questions will arise: first, whether your case is satisfactorily established in itself, without reference to any rule derived from the practice of the Ecclesiastical Courts? And if so, secondly, whether we are at liberty to act on such evidence, you not having complied with that which, as far as we can find, was an invariable rule.

The following facts were then established by the evidence of the petitioner and other witnesses examined on her behalf:—The marriage took place in December, 1834, at Woburn, where Mr. C. was living with his father and acting as agent for the Duke of Bedford; the petitioner was then between eighteen and nineteen years of age, Mr. C. about twenty-eight. According to her evidence the marriage was never consummated. On the night after the marriage the parties slept at Aylesbury, and the next morning, on entering the breakfast-room, he said, "My poor virgin wife!" About ten months after marriage she, having discovered what consummation should be, spoke to Mr. C. and charged him with want of confidence in not having told her. He said he was not able to perform the part of a husband. About fifteen months after marriage Mr. C. expressed a desire to consult a medical man, and saw a Dr. Crucifix, since dead. There was no change in Mr. C.'s condition after that, and the petitioner at her own desire saw the same medical man about three weeks later.

1860.
February 2.
H—
(falsely called
C—)
v.
C—.

The parties cohabited till October, 1838, living amicably and sleeping in the same bed. In October, 1838, the petitioner's father and mother were staying with them, and she inadvertently used some expression which led the mother to suspect that something was wrong; she insisted on knowing particulars, and then spoke to Mr. C., who upon that went away from home, and wrote to the petitioner saying that they should never meet till the day of judgment. The petitioner then went home with her father and mother. In the latter end of November she, however, went down to Woburn unexpectedly to Mr. C., for the purpose of reconciliation if possible. Mr. C. and his father persuaded her to return to London, his father saying that he thought his son might get his employment changed to London, and so avoid the scandal of the petitioner returning to Woburn. She accordingly returned to London with the intention of rejoining Mr. C. if he got a situation there; this never happened, and after 1838 the petitioner supported herself as a governess in several families. In the years 1851-2 she was connected with a servants' provident society in Marlborough Street, and in 1853 again became a governess. In 1849 she was suffering from some uterine disorder, and was attended by Dr. Henry Bennett, and the treatment to which he found it necessary to subject her entirely destroyed the usual signs of virginity. Dr. Bennett in his deposition, which had been taken before the registrar in consequence of his expected absence from the country, also stated that he had a distinct recollection that he had so much difficulty in making the examination that he was induced to ask Mrs. C. whether it was possible that the marriage had been consummated, and he believed she replied that to the best of her knowledge it had not; that he recollected that the condition of the parts was such as to warrant the inference that the marriage had not been consummated; and that there was no imperfection on her part, which would render consummation impossible.

The petitioner had seen Mr. C. once since 1838, on an occasion when he was persuaded to come to town to sign his name, which was needed for the receipt of a legacy to which she was entitled.

In answer to questions put by the Court, the petitioner said

that she was still in a situation as a governess; that motives of delicacy and expense had been in part the reason of the delay in instituting the suit; that the expense was less now, and she was earning about £80 per annum; that she had wished for some years, and as late as 1854, that Mr. C. would get over the scandal he was afraid of and consent to their living together; that towards the end of 1858 she had been informed that an allowance made by Mr. C. (since 1854) would be diminished; that that was partly the reason of the suit; she felt sure then he never intended reconciliation; that she should be happier in mind if free; that her position had been a source of great unhappiness to her, and she felt much worn; that no other situation or prospect in life was influencing her; that Mr. C. did attempt twice to consummate their marriage on the return from their wedding trip, but not before or after; that their separation had caused conversation at Woburn, and Mr. C. seemed afraid of the talk of the place if his wife returned; that as to her wish to return originally, she was very young, very unhappy, and thrown on the world.

A gentleman at Woburn, in whose family Mrs. C. had acted as daily governess while cohabiting with Mr. C., deposed that he had seen Mr. C., and spoken to him on the subject of some differences which he understood existed between Mr. and Mrs. C.; that he had understood that Mr. C. had charged her with some impropriety or levity of conduct; that the instances specified by Mr. C. were wholly frivolous, and the witness pointed this out and urged Mr. C. to be reconciled. He became excited, and in speaking of the early part of their marriage, said, "her conduct had been noble and forbearing;" that in answer to a remark of the witness, that the supposed difficulty might arise from nervousness or some temporary and curable cause, Mr. C. said, "Impossible."

Mr. Ford, the petitioner's solicitor, deposed that he became acquainted with the petitioner in connection with the Servants' Provident Society in Great Marlborough Street; that he had been frequently consulted by her about her position, but never took any legal step in the matter till 1854, when she was ill and unable to maintain herself. He then applied to Mr. C. for relief during her illness. Mr. C. refused; she then incurred debts for necessaries, and proceedings were taken against Mr.

1860.

February 2.

H—
falsely called
C—)
v.
C—.

1860. C. for payment of the bills. This resulted in a correspondence,
 February 2. and Mr. C. called on Mr. Ford in reference to the matter.
 H— Mr. Ford suggested that Mr. C. should receive his wife again,
 (falsely called C—) which was still her desire, but contrary to Ford's opinion. C.
 v. expressed a distaste for the revival of scandal in Woburn, and
 C—. said it was out of the question. Ford said, "You ought to
 "assist your wife, because you have inflicted on her the great-
 "est injury a man can on a woman; you know you ought
 "never to have married her." That Mr. C. did not deny any-
 thing, did not say much, but his demeanour was mournful and
 shamefaced. Subsequently an arrangement was made to pay
 £20 per quarter, which was observed till October, 1858, when
 a letter from Mr. C.'s solicitor stated that in consequence of
 his own reduced income he could in future only allow the
 petitioner £45 per annum. *Cur. adv. vult.*

1860. THE JUDGE ORDINARY delivered the following as the judg-
 February 2. ment of himself and WILLIAMS, J., in this case :

This was a petition praying a decree of nullity of marriage.

The petition alleged that on the 16th of December, 1834, the
 petitioner, a spinster, then eighteen, was married in fact, but
 not in law, to Geo. Castleden, of about thirty years of age;
 that from the 16th of December, 1834, till July, 1838, the peti-
 tioner cohabited with Geo. Castleden, occupied the same bed
 with him, and was willing to receive his conjugal embraces,
 but that nevertheless Geo. Castleden never consummated the
 pretended marriage; that at the time of the celebration of
 the pretended marriage Geo. Castleden was, by reason of his
 frigidity, or impotency, or malformation, legally incompetent
 to enter into the contract of marriage.

Geo. Castleden was served with a citation and a copy of
 the petition on the 30th of November, 1858, but did not ap-
 pear.

The case, therefore, as far as the respondent was concerned,
 was undefended; but this Court is not at liberty to treat causes
 of this nature merely as questions between party and party.
 It has an important duty to discharge towards the public also,
 and must take care not to make a decree unless sanctioned by
 the principles which guided the discretion of the Ecclesiastical
 Courts in similar cases.

The petitioner gave evidence on her own behalf, and proved the marriage and cohabitation as alleged in the petition; and as to the non-consummation, stated that she and Geo. Castleden passed the first night after their marriage at Aylesbury, and that when she entered the breakfast-room next morning, he exclaimed, "My poor virgin wife!" That on two occasions afterwards he attempted to consummate the marriage, but did not succeed, and that the attempt was never repeated; that about ten months afterwards she had discovered what consummation should be, and reproached him with his want of confidence in not telling her this; that he said he was not able to perform the part of a husband; that about fifteen months after the marriage he expressed a wish to consult a medical man, Dr. Crucifix, and afterwards said he had done so; that she soon afterwards saw and conversed with Dr. Crucifix, who is now dead; that they continued to live amicably together till the 10th of October, 1838, but she found no change in his condition; that in October, 1838, her father and mother came on a visit to her and Geo. Castleden at Woburn, where they resided; that she then made a communication to her mother, which her father and mother repeated to him, whereupon he left his house, and wrote, saying that he would never meet her again, and she left the house with her father and mother and went with them to London; that at the end of November she returned to his house at Woburn, and asked him to be reconciled, but he refused; that she continued to express to him a desire to be reconciled, and to live with him, down to the spring of 1854. In the meantime she had maintained herself as a governess, but then being ill, applied to G. C. for assistance, which was not granted; and afterwards, by advice of Mr. Ford, an attorney, contracted debts for necessities, and he, by arrangement with her and the parties, took legal proceedings and compelled Castleden, as her husband, to pay them. If the marriage was void *ab initio*, she then knew it to be so, and the person whom she caused to be charged as her husband was not her husband. The course which she then took could only be justified by the supposition that he was her husband, and is in the nature of an admission (to put it no higher) that such was the fact. (See the observations of Lord Stowell in *Guest v. Guest*, 2 Consist. R. 321.)

1860.

February 2.

H—
 (falsely called
 C—)
 v.
 C—.

1860.
February 2.

H—
(falsely called
C—)
v.
C—.

Mr. Ford proved that in December, 1854, he had an interview with G. Castleden, and pressed him to receive the petitioner, which he refused, expressing a distaste for the revival of the scandal which would arise in so small a place as Woburn. Afterwards an arrangement was made by Mr. Ford with Castleden, through the intervention of his solicitor, Mr. Lawrence, that he should pay her £20 quarterly. Those payments were made regularly till October, 1858, when Mr. Lawrence wrote, saying that his client's pecuniary circumstances were altered; that he could not continue to allow her more than £45 per annum. Mr. Ford then advised an application to this Court, and the petition was thereupon filed. The petitioner, as to this part of the case, stated: "The reduction of the allowance was partly the reason of these proceedings, and I felt sure he never intended to be reconciled. I thought I should be happier in my mind if I were free. I felt much wronged. I was not influenced by having in mind any other situation in life." In addition to her own statement, the petitioner gave evidence of two conversations between third persons and the respondent, from which it might be inferred that he meant to admit that he was not able to consummate his marriage, but he did not admit it directly. The petitioner has not resorted to the almost invariable practice of issuing a monition ordering the respondent to submit to the inspection of medical men in order that the Court might have their report on his condition. To prove her own condition the petitioner gave in evidence the examination of Dr. Bennett (now abroad), taken before a registrar under an order of the Court. In *Pollard v. Wybourn*, 1 Hagg. 727, Dr. Lushington says, "This Court always requires a certificate of medical persons as to the state and condition of the woman." In such a case as the present she should be shown to be *virgo intacta* and *apta viro*. Dr. Bennett's evidence was in these terms:—That he had a distinct recollection that he had so much difficulty in making the examination, that he was induced to ask Mrs. C. whether it was possible that the marriage had been consummated, and he believed she replied that to the best of her knowledge it had not; that he recollected that the condition of the parts was such as to warrant the inference that the marriage had not been consummated.

Now, upon this it must be remarked that the examination by Dr. Bennett was not made for the purpose of the cause, nor with a view to giving the Court exact information on the subject. It was made ten years ago, and the doctor now speaks from recollection, and not from minutes made at the time. He does not say that she was *virgo intacta*, or that her state was such that consummation could not have taken place; and as to her evidence, of course it must be assumed that she cannot be more positive now than then. Again, as to her being *apta viro*, the Doctor says, "There was no imperfection on her part to render consummation impossible," which I take to be a very equivocal description of her state; and then he assigns a reason why any further examination would now be useless.

Upon this state of facts the first remarkable thing to be attended to is the length of time which has elapsed since the alleged discovery of the incompetency of the respondent to enter into a contract of marriage and the filing of the petition, which is much greater than has existed in any recorded case. The alleged incompetency, if it exists now, existed and was known to exist at the time of the separation in 1838, full twenty years before the petition was filed. It has been held that lapse of time alone is not a bar to such a proceeding; but it has often been treated as a circumstance of great importance. In *Guest v. Guest*, 2 Consist. R. 323, Lord Stowell said: "But the length of time which has elapsed is in itself almost a bar, for I do not remember any instance in which such a suit has been allowed to be instituted after such an interval; that a period of seven years should have been allowed to elapse in a case where even a very short cohabitation would have sufficed for the discovery, is not allowed by any principle of law with which I am acquainted." In *Briggs v. Morgan*, 2 Consist. R. 330, the same learned judge said that a delay of sixteen months was not easily accounted for, it being a case of alleged actual malformation in the woman. Other learned judges have said that time alone would not be a bar to such a suit. The subject appears to have been much considered by the Judicial Committee of the Privy Council in *B— v. B—*, 1 Eccl. & Adm. 248; at p. 260. Dr. Lushington, expressing the opinion of the committee, says: "It is obvious

1860.

February 2.

H—

(falsely called

C—)

v.

C—.

1860. "for these reasons (which he had before assigned) that time,
 February 2. "though not in itself under ordinary circumstances a bar, yet,
 H— "especially when the lapse of time has been very considerable,
 (falsely called C—) "is not an unimportant matter in suits of this description, and
 v. "more particularly as concerns the wife."

C—

But I apprehend that the principle upon which the Court is to proceed must be the same whichever party complains. Time, then, not being an absolute bar to such a suit, let us see what are the principles upon which the Court is to proceed; they are clearly stated in the same case, p. 260: "In other respects too, as relates to the right of the husband to prosecute a suit of this description, time with other facts deserves great consideration. The law affords a remedy to those who are really aggrieved and sensible of the grievance, and then only *vigilantibus non dormientibus*. The remedy is given on account of the loss sustained and the evil felt, not to promote or assist other purposes having no relation to it. If the husband is silent for so long a period unaccounted for that the presumption would naturally arise that he acquiesced in the consequences which such an unfortunate connection entailed upon him, he could hardly be entitled to say, 'Give me a remedy for a grievance I have not felt,' and that to the detriment of another." Now this passage is wholly without reference to any doubt as to the existence of the state of things complained of, and it is applicable to the present case except only, that, if the prayer is granted, the detriment to the respondent would probably be confined to the annoyance which the agitation of such a question must inflict. Dr. Lushington proceeds: "Their Lordships are all of opinion that cases might occur where long acquiescence, with knowledge, would operate as a bar to the prosecution of such a suit, and more especially if the circumstances showed that the suit was brought not on account of the evils resulting from the imperfection, but for other and different reasons."

In the present case the petitioner, with full knowledge of the respondent's condition, for sixteen years after the separation continued to press him to receive her back to cohabitation; after that contracted debts, and procured the creditors to enforce payment from him as her husband—a proceeding wholly inconsistent with the present, and a sort of moral

estoppel against a subsequent allegation by her that he was not her husband ; after that negotiated for an allowance, which she received for three or four years, and upon an intimation that it must be reduced, by the advice of her attorney, and no doubt principally for that reason, although some others were mentioned by her, instituted this suit. Under such circumstances it seems to me impossible to say she is suing on account of the evils arising from the respondent's imperfections, but for other and different reasons. These observations apply to the conduct of the petitioner ; but there are other considerations which must not be lost sight of.

The petitioner has not given the medical testimony always called for, that she was and is *virgo intacta*, and was *apta viro* ; for that she has substituted Dr. Bennett's deposition, which, in my opinion, is a very unsatisfactory statement, and leaves me in some doubt as to each of the matters to be established. It may be said that she cannot now give better testimony ; true, but had the suit been instituted in reasonable time, she might have done so. Again, no attempt has been made to procure an examination of the respondent. If he did not consummate the marriage, it is reasonable to presume that he could not ; but the reason of his inability is left in doubt ; it may have arisen from malformation on his part ; it may have arisen from some constitutional defect on his part, combined with some difficulty on the part of the petitioner ; it may have been the case of a man *frigidus versus hanc* ; if the latter was the case, it may have been much to his detriment that the suit was not commenced many years ago.

I do not say that such a suit cannot be sustained without a monition to undergo inspection, for in a very singular case about a century ago (*Tenducci's case*) I do not find that any such process issued, and the suit was sustained ; but that case was so singular in all its features, that it can hardly be deemed a precedent for any other ; and it seems to me that the omission of any of the means usually taken for procuring information for the Court, is a circumstance not to be forgotten.

Adopting the language of the Judicial Committee, and founding my judgment upon the whole of the case, and not any one part ; considering the length of time that has elapsed since the marriage and the separation, the knowledge which the peti-

1860.

February 2.

H—
(falsely called
C—)
v.
C—.

1860.
February 2.
—
H—
(falsely called
C—)
v.
C—.

tioner then had of her husband's imperfection, her request repeated continually for sixteen years afterwards to be received back by him, and her arrangement with creditors to sue him as her husband for the debts contracted by her, her negotiation for, and the receipt of, an allowance for several years, and the institution of this suit on an intimation that the allowance would be reduced; considering also the imperfect nature of the medical testimony adduced, and that much more precise and certain testimony might have been had, if the suit had been commenced within a reasonable period, I am of opinion that the petitioner is not entitled to a decree pronouncing this marriage void *ab initio*.

BRAMWELL, B., delivered the following judgment on the case: In this case I think the impotency of the husband is established.

First, there is the oath of the petitioner, whom I, acting as judge of fact, believe to be a credible witness, and consequently to be trusted, unless her story is highly improbable or contradicted by surrounding circumstances or other credible witnesses. Now she swears that the marriage has never been consummated; that no attempt to do so was made on the night of the marriage, nor until after she and her husband returned home; then two unavailing attempts. She says she continued to live with him for four years, when, in consequence of something she said to her mother, her father and mother made inquiries, discovered the truth, and reproached her husband, who was so displeased that he parted with her, and has since refused to live with her; a period of twenty-one years having elapsed since then. The witness, Mr. Green, proves that at the time when this took place, in 1838, the respondent owned that the petitioner's conduct at first was "noble and forbearing;" that the fault was on his side, and that it was incurable. The witness Ford proves that in the year 1851, on his reproaching the respondent with having done the petitioner the greatest injury that could be done to a woman, the respondent made no answer but hung his head and looked mournful. Then there is the affidavit of Dr. Bennett; he says that ten or twelve years since, certainly since 1843, he examined the petitioner, and that the condition of

her genital organs was such as to warrant the inference that the marriage had not been consummated; he also states that he asked her if it was so, and "believes she replied, to the best of her knowledge it had not been." If that means he was in doubt whether she said it had or had not, it would be strange, as it would be inconsistent with his recollection of the condition of the parts; but it means what it says, viz. that he recollects her answer to have been that she did not know, but she believed not; to my mind a very likely answer for a modest woman to give where there had been an attempt at consummation; but an answer which could not honestly have been given had there been connection frequently, or even to the small extent which would preclude doubt.

The respondent does not appear to deny the complaint; Dr. Bennett also says, that from his treatment inspection of the petitioner would now be useless. I do not think that the petitioner's living with her husband for four years, or being willing, as she has been, at any time to return and live with him, are insuperable difficulties in the way of believing her story. I can understand the sexual passion, perhaps naturally weak, lying dormant in a modest woman till roused by fruition; I can understand that regard for her husband, a feeling of shame, the expense of proceedings, may together have prevented the complaining till compelled to do so. But if a doubt is to be entertained of her story, what is supposed to be the truth? It cannot be that connection has taken place habitually or frequently, and that the quarrel was on some other ground. To believe that would be to disbelieve the petitioner and all her witnesses. There is no suggestion of any other cause of quarrel. It is impossible to suppose that there is any collusion between her and her husband, with whom she has not communicated for twenty years. Collusion means some fraudulent agreement to present to the Court a falsity, or keep back a truth. When was such agreement made—twenty years ago? What falsity can be suggested to be presented, what truth withheld? It must be that the separation of these parties has arisen from sexual intercourse not having taken place between them; and if this is not from his impotency, to what is it to be attributed? Is it her fault? Dr. Bennett says there was no imperfection on her part to render consummation im-

1860.

February 2.

H—
(falsely called
C—)
v.
C—.

1860.
February 2.
H—
(falsely called
C—)
s.
C—.

possible. It is suggested that the husband may have been a nervous man, not impotent, but unable to overcome an extraordinary difficulty; but a decent woman could not discriminate between such cases; if desirous of parting with him on the supposition of impotency, she would be equally so on the supposition that the condition of things was such as I mentioned, and consequently as much, and no more, likely in the one case as in the other to wish to continue to live with him. Besides, the evidence is the other way. He owns it is his fault, not hers; he calls her conduct noble; he admits he has wronged her; he does not send her to a medical man, but goes himself, to see if the difficulty can be removed. Further, the petitioner swears no effort was made on the night of the marriage, and that on the morning after he called her "My poor virgin wife."

I attach no value to her not monishing him. The most unfavourable result to her of his submitting to an examination would be that his organs of generation should appear to be perfect; but that would be no impediment to her having a decree. (See *N— v. M—*, 2 Robert. E. R. 625, where the report of the surgeons is, that the parts appear perfect; but, from the wife being *virgo intacta*, they infer that he was unable to use them, and conclude him to be impotent, and decree in conformity is pronounced.) He does not defend, if he did he might complain; as the opportunity for submitting to inspection was not given. As it is, the proceeding would be a form which he might disregard.

Nor do I think it of any moment that she allowed him to be sued for debts contracted by her. It is said to be an admission by her; that is assuming her to have a considerable knowledge of the common law and the law ecclesiastical; but I doubt if it is anything but an admission of the truth—viz. that he was her husband *de facto*. I strongly incline to think that the marriage exists at common law until annulled by decree. I cannot think that this petitioner could marry again now without incurring the penalties of bigamy. Besides, taken as an admission, what is it worth?—an admission of what? Of his capacity? But we know the facts, and are at least as competent to judge as the petitioner. What fact is she supposed to admit inconsistent with those we know? That

he has had intercourse with her? Impossible. That it was her fault he had not? Impossible. If, then, her supposed admission supplies no new or different fact, it is, at most, the admission of a conclusion, which conclusion I think erroneous. Under these circumstances, I am satisfied the marriage has not been consummated; that the cause of the non-consummation is respondent's inability; and that having continued from 1834 to 1838, continuing (as confessed) in 1851, confessed by his conduct in not taking his wife back to continue till now, not denied in this suit, I am also satisfied he was impotent at the time of the marriage, has continued so hitherto, and is incurably so. I think this conclusion justified by the cases of *Pollard v. Wybourn*, 1 Hagg. 728; *A—*, falsely called *B— v. B—*, 1 Eccl. & Adm. 12. So far, the question is one of fact.

It remains to consider whether the petitioner is entitled to the sentence she prays. As to that I wish to be understood as expressing myself with the greatest distrust of my correctness. It is a question on a part of the law with which I am wholly unacquainted. I understand the law or practice to be this, that the decree is not a matter of right, but is discretionary with the Court, and will not be pronounced unless the petitioner is seeking to get rid of a grievance occasioned by her having gone through the form of marriage with an impotent person. Then here it is suggested that the petitioner lived with the respondent four years; endeavoured to get him to take her back; has always been willing to go back, and only sues now because he refuses to maintain her; that she is in truth not complaining of the marriage and seeking to get rid of it because it is a grievance to her, but complaining because her husband will not maintain her. I think that is not so; I think these circumstances only show that she would not complain of the marriage if he would live with her or maintain her, but that, as he will not, she does not only in form but in substance complain of it, and seek to get rid of what is to her a grievance. It is as though a person took possession of my land, and I forbore to complain as long as he gave me a compensation; when he ceases to do so, I make my true complaint. It seems to me it may be shown in this way: she surely has a cause of complaint against the respondent. What? Not that he won't maintain her; not that he won't live with her; she cannot truthfully

1860.

February 2.

H—
(falsely called
C—)
v.
C—.

1860.
February 2.
H—
(falsely called
C—)
v.
C—.

say he is her real husband and bound to do so. Whether she could maintain a suit for restitution of conjugal rights is doubtful. Such a suit may be converted into a suit for nullity by a defence which would be a ground of nullity. (*Swift v. Swift*, 4 Hagg. 153.) There seems, however, doubt whether a man can set up his own impotency as a ground of nullity (*Seton v. Seton*, 3 Phill. 147). Be this as it may, it seems difficult to believe that, after a voluntary separation for this cause for twenty-one years, restitution could be enforced. But whether it could or could not, it would be an unjust remedy; unjust to him, to which the petitioner knows she is not entitled, and which, therefore, she ought not to be driven to resort to. I say she knows she is not entitled, because she knows a decree for it would be, in part at least, nugatory. Nor can she be bound to resort to the precarious remedy, such as it is, of getting persons to supply her, and then sue him. Moreover, with this fetter on her, she could not, as a decent person, permit herself to form a new engagement, or even allow herself to entertain an affection for a man, when the result might be bigamy or other criminality. It would be different, indeed, if by these proceedings she were endeavouring to terrify or shame him into some arrangement—but that is not so. It is not doubted that she is honestly and *bond fide* trying to get rid of the cruel state of things under which she has suffered for twenty-five years, with such palliatives as her own youth and strength and her husband's assistance afforded; and that those failing, she now prefers her complaint of the original wrong, and seeks relief from it.

Of course I do not think these opinions inconsistent with *B— v. —B*, 1 Eccl. & Adm. 248, 259; if they are, they are wrong as being opposed to the highest authority. In that case the husband was the petitioner; the wife laboured under a malformation which made impregnation impossible; the parties had lived together many years, sexual intercourse had taken place, and, according to the evidence, the respondent was not a virgin. They had lived together so long, and the malformation was such, that the husband must have known that there was something abnormal. He took no steps to see if it could be remedied; they separated, not on account of this, but because they disagreed, and it was not until after five

years the suit was instituted; the only ground for not complaining till then was, that he did not know the defect was incurable—the answer to which is, that he knew of the defect, and did not know, or trouble himself to inquire, if it was curable. In giving judgment, Dr. Lushington says: “In other respects, too, as relates to the right of the husband to prosecute a suit of this description, time, with other facts, claims great consideration. The remedy is given on account of the loss sustained and the evil felt, not to promote or assist other purposes having no relation to it. If the husband is silent for so long a period unaccounted for that then the presumption would naturally arise that he acquiesced in the consequences which such an unfortunate connection entailed on him, he could hardly be entitled to say, ‘Give me a remedy for a grievance I have not felt,’ and that to the detriment of another.—Long acquiescence with knowledge might operate as a bar, especially if the circumstances showed the suit was brought, not on account of the evils resulting from such imperfection, but for other and different reasons.—Then *Briggs v. Morgan* is referred to as showing that lapse of time is proof of insincerity. Delay unaccounted for might, with other circumstances, constitute a bar. The inquiry, therefore, is, whether the lapse of time is accompanied with other facts which prove the insincerity of the suit; in other words, that whatever may be the defect of the wife, it was not a grievance to the husband, or the real cause why the suit was brought.” He then proceeds to show that the unfitness of the wife never was a grievance, and that a separation took place on the ground of disagreement, without the slightest reference to the subject-matter of the suit. Now it is obvious that that case is wholly different from this. There the defect in the woman was not the grievance; the husband had not complained of it; they had not parted on that account; they would have done so had it not existed. Moreover, the wife there resisted; she was no longer a virgin. So many years had gone by that her situation was entirely altered, and it would have been grievously to her detriment to separate them. Here it is quite otherwise. What is the petitioner’s grievance here? Not merely that she cannot have sexual intercourse, but that owing to the man’s frigidity she

1860.

February 2.

H—
 (falsely called
 C—)
 v.
 C—.

1860.

February 2.

H—
 (falsely called
 C—)
 v.
 C—.

cannot have even the *consortium vitæ* with him, cannot have conjugal rights. He makes no objection, no complaint of her proceedings, and obviously the decree sought will not be to his "detriment." It is true, it might have been better for him if she had brought it sooner, but that does not show that it is not good for him now; it is really to fancy an objection for a man who will not come to make it for himself. Surely there is nothing in this case which "shows the suit is brought "not on account of the evils resulting from such imperfection, "but for other and different reasons." Here, indeed, "time" has elapsed, but what "other facts" are to be taken into consideration with it? The wife's "silence for so long a period "is not unaccounted for;" the "presumption of acquiescence" does not arise therefore from that only; what else is there? While she lived with him she was ignorant of her rights; what has she acquiesced in since?—that practical decree of nullity which she now seeks according to law. Her sincerity is, I think, not doubtful. The defect of the husband is a grievance to the wife, and the real cause why the suit is brought. On these grounds I cannot help thinking the petitioner entitled to the decree she prays. There seems some uncertainty whether such marriages are absolutely null or only voidable. Dr. Lushington in both reports of *B— v. B—* is express they are null; some older writers seem to say that they are only voidable by decree of nullity; the difference may be this, that they are valid at common law unless avoided—null by the law ecclesiastical. If so, and the judgment of the Privy Council is express to that effect, I think the petitioner's case the stronger; because in that case mere consent could not make the marriage valid—it would always continue what it originally was, "null." Then, as the sentence of nullity would only affirm truth, a reason would be required why it should not be pronounced, not why it should. The burden should be shifted from the petitioner. I can see no such reason, while I see many the other way. In short, the case may be put thus: in causes of this description I understand three questions may arise.

Whether I am right in this respect I entertain the greatest distrust; but it seems to me there may be three questions. Is the impotency established? Is marriage to an impotent

person the grievance sought to be got rid of? Is there any injustice to the respondent in a decree to that effect at the time and under the circumstances stated? I think these questions ought to be separately considered, and if each is answered in favour of the petitioner, she ought to have a decree. I think it is wrong in this or any other case to accumulate all the doubts that bear on each question, and act on a general indefinite objection to the case. I think that appears by our system of pleading and issue at common law. I cannot doubt that if there were two issues here for a jury,—one, whether the respondent is impotent; the other, whether the petitioner is sincerely complaining of the grievance she would get rid of by the decree she seeks,—they would find for her. As to the remaining question, it is impossible to suppose that any injustice would be done to the respondent, of whose conduct in marrying her, and since, and in now not assisting her to get rid of him, as he does not appear, I forbear to say what I think, but who, one would hope, would rejoice at the partial reparation of the wrong he had done her.

Petition dismissed.

1860.

February 2.

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H—
(falsely called
C—)
v.
C—.



INDEX TO THE PRINCIPAL MATTERS.

INDEX TO PROBATE CASES.

ADMINISTRATION.

1. *Administration.—Attorney of Guardian.—Administration of the Effects in England of a domiciled Brazilian granted to an Attorney for that purpose duly appointed.*

A. died domiciled in Brazil, intestate, leaving a widow and several children (all minors), and some personal property in England. The Judge of Orphans, a functionary in Brazil charged with the administration of estates belonging to minors, having appointed B. guardian of the children of the deceased, who appointed C., the Brazilian minister at Turin, his attorney in the matter, with power of substitution, issued letters of request to the judicial authorities in England to collect and deliver the same to C. or his representative. C. appointed D., resident in England, his substitute. Authenticated copies of the proceedings before the Judge of Orphans, and of the power of attorney to C., and the original power of attorney, with affidavits of the facts of the case, and of the law of Brazil, having been filed, the Court granted administration to D.—*In the goods of Louis Bianchi* (deceased), 511.

2. *Administration.—Attorney of Next of Kin without the Jurisdiction of the Court.—Surety.—Practice.*

Administration will be granted to the attorney of the next of kin, such attorney being resident without the jurisdiction of the Court, if the sureties to the bond are resident within the jurisdiction.—*In the goods of Joseph Leeson* (deceased), 463.

3. *Administration.—Bankrupt.—Majority of Interests.—Practice.*

Of the two rules for the guidance of the discretion of the Court in granting administration, where parties in equal degree dispute it, viz. “that *ceteris paribus*, the male is preferred to the female,” and “that the grant will follow the majority of interests”—the latter is the more stringent. The grant being made to persons representing three-fourths of the interest, their sureties were ordered to justify to the extent of the other fourth; their costs directed to be paid out of the estate, and no order made as to the costs of the other party.—*Iredale v. Ford and Bramworth*, 305.

ADMINISTRATION—*continued.*4. *Administration.—Husband and Wife deceased.—Husband's Next of Kin.*

Where the husband has survived the wife and died intestate, without administering to her estate, his next of kin must constitute themselves his legal personal representatives before they have any claim to administer to the wife's estate.—*In the goods of Jane Elizabeth Crause* (deceased), 146.

5. *Administration.—Married Woman sole Next of Kin.—Application of Creditor.—Husband's Right to Administration.*

The husband is entitled to take out administration in right of the wife, to her next of kin deceased intestate, and her renunciation in favour of a third person, *e.g.* a creditor of the deceased, will not deprive the husband of his right.—*Haynes v. Matthews*, 460.

6. *Administration.—Practice under the 73rd Section of 20 & 21 Vict. c. 77.—Lunatic solely entitled to Distribution.*

A. died intestate, leaving her only sister solely entitled in distribution, a lunatic, and without a committee of her estate or person. Administration for the use and benefit of the sister during her lunacy was granted to the stepmother, who was co-executor and co-trustee with the deceased of the father's will, and beneficially interested under it. Surviving cousins not cited.—*In the goods of Mary Burrell*, spinster (deceased), 64.

7. *Administration.—Next of Kin resident out of the United Kingdom.—Practice under the 73rd Section of 20 & 21 Vict. c. 77.*

A. B. died a widower and intestate; his only son, and the sole person entitled in distribution, was resident in Australia; a legal representative being required immediately for the preservation of the property, administration for the use and benefit of the son was granted to his father-in-law, under the 73rd section of the Probate Act.—*In the goods of John Jones* (deceased), 13.

8. *Administration.—Practice under the 73rd Section of 20 & 21 Vict. c. 77.—Notice to Persons entitled to grant.*

Administration will not be granted under section 73 of 20 & 21 Vict. c. 77, to a person not by law entitled to the grant, when the person who is entitled to it is resident abroad, and has not received notice of the application, unless the Court is satisfied that it is necessary and convenient that the grant should be made. A general statement upon affidavit that "it is necessary for the preservation of the personal estate and effects of the deceased that administration should be granted," will not satisfy the Court, in the absence of such notice.—*In the goods of Harriet Cooke* (deceased), 267.

9. *Administration.—Practice under the 73rd Section of 20 & 21 Vict. c. 77.—Nominee of Persons solely entitled in Distribution.*

A. died intestate, leaving an aged uncle and aunt, the only persons entitled in distribution; at their desire administration was granted for their use and benefit to their son on the sureties justifying.—*In the goods of Hannah Roberts* (deceased), 64.

10. *Administration (with Will annexed).—Foreign Grant to Minor.—Practice.*

The Court will not follow the grant of the country of domicile when it would,

ADMINISTRATION—*continued.*

by so doing, be acting in contradiction to the law of this country. An application for a grant of letters of administration to a minor, assisted by his uncle, his curator, lawfully appointed according to the law of the domicile, refused.—*In the goods of her Royal Highness the Duchess D'Orleans* (widow, deceased), 253.

11. *Administration (with Will annexed) granted to the Nominees of a Married Woman appointed by Deed.*

A. bequeathed the whole of his property to B. (whom he appointed his sole executor), in trust for such persons as C., a married woman, should by any writing under her hand or by her will appoint, and in default of appointment for C.'s separate use absolutely. B. renounced probate of the will, and C. by indenture of appointment assigned all her interest under the said will and her right to letters of administration with the said will annexed to D. and F. for the purposes in the same indenture mentioned. The Court granted administration with the will annexed to E. and F.—*In the goods of John Joseph Martindale* (deceased), 8.

12. *Administration (with Will annexed) to Residuary Legatee.*—20 & 21 Vict. c. 87, s. 88.

Probate of the will of R. C. had been granted by the Peculiar Court of W. to his executor, R. S. C., who was now abroad, and supposed to be in Australia. R. C. at the time of his death had assets out of the jurisdiction of the Peculiar Court of W. A motion to grant administration with the will annexed, under section 88 of the Probate Act, to the residuary legatee of R. C. refused. *Semble*, that on the Court being satisfied that the executor of R. C. was in a distant country, it would grant administration to his residuary legatee.—*In the goods of Robert Cooper* (deceased), 66.

13. *Administration (with Will annexed) to Sole Legatee.*

An application for a grant of administration with the will annexed to the sole legatee, on affidavit that the testatrix died possessed of no other property than that specifically described in the will. Held, that no reason was shown for not citing the next of kin; that they must be cited; or that administration might be taken limited to the property specified in the will.—*In the goods of Jenny Watson* (deceased), 110.

14. *Administration (with Will annexed).*—*Universal Legatee.*—*Administration or Probate.*—20 & 21 Vict. c. 77, s. 39.

The universal legatee of a testamentary paper is entitled to administration with the will annexed, but not to probate. No trace of any different practice can be found in the registry. *Semble*: the 29th section of 20 & 21 Vict. c. 77, relates to the procedure of the Court, not to the principles on which it is to act.—*In the goods of Thomas Henry Oliphant* (deceased), 525.

15. *Administration.*—*Wife's Next of Kin.*—*Renunciation of Husband's personal Representation.*—*Practice.*

A. died in 1831, being at the time of her death entitled to the reversion of a share of £200, leaving her husband (B.) and several children by him her surviving. The husband subsequently married C., and died in 1832 intestate, leaving C. and several children by his two marriages him surviving. D., a creditor, took out administration to his effects. In 1857,

ADMINISTRATION—continued.

A.'s reversion came into possession ; D. renounced his right to administer to A.'s estate. On application to the Court to grant administration of it to C. as B.'s relict : Held, that the children of A., and not C., were entitled to the administration.—*In the goods of Jane Bell*, 288.

ADMINISTRATION BOND.

1. *Administration Bond.—Amount.—Sureties.*—20 & 21 Vict. c. 77, ss. 81, 82.

A. died intestate, leaving his mother solely entitled in distribution ; property under £3,000, and debts £45. The Court granted administration on the mother entering into a bond in the amount of £100 with sureties.—*In the goods of Matthew Gent* (deceased), 54.

2. *Administration.—Further Duty payable.—Sureties.—Amount of Bond.*—55 Geo. III. c. 184, ss. 41, 42.—20 & 21 Vict. c. 70, ss. 81, 82.

Administration was taken out under £20,000, and the usual bond in a penalty of double that sum entered into. The administratrix subsequently received a sum of money from a bankrupt estate indebted to the deceased, which made it necessary to reswear the amount under £25,000. The Court, under the 82nd section of 20 & 21 Vict. c. 77, directed the registrars of the principal registry to receive a separate bond in the penalty of £10,000, which, together with the original bond, would be double the amount of the sum under which the estate was to be resworn.—*In the goods of Harriet S. L. Weir* (deceased), 506.

3. *Power of Attorney.—Alteration of Condition of Bond.—Alteration of Terms of Affidavit.*

When a party entitled to administration is abroad, and has given a simple power of attorney to his agent in England to take out the administration for his use and benefit, the Court will only grant administration to the agent on the same terms as it would have granted it to the party himself. The Court, on application, refused to alter the usual conditions of the administration bond and the terms of the ordinary administration oath.—*In the goods of Charles Goldsborough and Others* (deceased), 295.

See PRACTICE, 3. SURETIES, 1, 2.

ADMINISTRATION PENDENTE LITE.

1. *Administration pendente lite.—Grant to Defendant.*

Under the 70th section of the Probate Act, administration *pendente lite* was granted to the defendant in the suit, the plaintiff not opposing.—*De Chatelain v. Pontigny*, 34.

2. *Administration pendente lite.—Security.—Passing Accounts.—Payment of Debts.*

An administrator *pendente lite* of personal estate was appointed, on his giving security to the amount of one year's income of the property ; his administration to be under the direction of the Court. The Court directed that he should not discharge claims on the deceased's estate until they had passed before the registrar.—*Charlton v. Hindmarsh*, 519.

ATTESTATION.

1. *Attestation of a Will.—Subscription of Witnesses.*

W. F. signed his will in the presence of two witnesses, A. and B. B. being unable to write, A., by his request, guided his hand, when he subscribed

ATTESTATION—*continued.*

the will. Held, that the subscription of B. was valid.—*In the goods of William Frith* (deceased), 8.

2. *Attestation and Subscription of Witness.*—*Will.*—1 *Vict. c. 26, s. 9.*

A. acknowledged his signature to duplicate wills in the presence of B., who thereupon attested and subscribed his wills. A few hours after, C. being also present, B. suggested the propriety of a second witness. A. thereupon acknowledged the testamentary papers and his signatures in the presence of B. and C. B. pointed out his subscription to C., who wrote his own name; B. then, on one of the papers, completed, by crossing it, the letter F., being the initial letter of one of his Christian names, which cross he had omitted in the morning; he then on both the papers added the date, "the 17th day of December, 1857." Held, not to be a sufficient subscription in attestation of the will.—*Charlton v. Hindmarsh*, 433.

3. A will attested by two witnesses, both since dead, with their respective marks, no one else being present except the drawer, admitted to probate with consent of next of kin.—*In the goods of Louisa Edwards* (deceased), 10.

See EVIDENCE.

AMENDMENT.

1. *Amendment.*—*Condition.*—*Pleading.*—*Practice*

B. died in May, 1850, leaving a will, dated May, 1849, and two codicils, dated May, 1850. Probate of these papers was taken in common form in July, 1850. In April, 1858, two legatees under the will intimated their intention of disputing the two codicils; whereupon the surviving executors commenced a suit and filed their declaration on the 25th of June. On the 21st of July the defendants filed pleas: first, alleging that the codicils were unduly executed; and secondly, that the testator was of unsound mind at the time of their execution. On the 18th of November the plaintiffs set the case down for hearing, but it had not come on for trial. The defendants now, on the affidavit of their solicitor, applied for leave to amend their pleas by inserting similar pleas as against the will, on the ground that since the pleas were filed, their solicitor had received information impeaching the validity of the will. The Court, *hesitanter*, allowed such amendment, on condition of a portion of a legacy already received by one of the defendants being brought into court, the costs of the motion being paid, and the pleadings amended within a week.—*Ware and Grove v. Claxton and Claxton*, 251.

2. *Amendment at Trial.*—*Will.*—*Pleading.*—*Costs.*—*Practice.*

The inclination of the Court is to allow the record to be amended at the trial by the addition of a new plea, rather than to shut out any defence which might be raised. The defendants were allowed to put on the record at the trial a plea, that the will in dispute had been obtained by the undue influence of one of the plaintiffs, subject to the postponement and rehearing of the cause, if required by the plaintiffs, and to the payment by the defendants of all expenses incurred by such postponement.—*Ibidd and Price v. Sumpson and Spriggs*, 269.

BANKRUPT.

The fact of a man having been bankrupt many years since is not to be pressed against him as a ground for depriving him of a grant of administration: but when he has been a second time a bankrupt, and under the second bankruptcy no dividend has been paid, *Quere*, whether such a bankrupt could be said to have any interest in the intestate's estate.—*In re Dale v. Ford and Bramworth*, 305.

BOND. *See* ADMINISTRATION BOND.

CAPACITY. *See* INCAPACITY. LUCID INTERVAL.

COMPROMISE.

Compromise.—Proving Will in solemn Form.—Jurisdiction of Court of Probate.

In a cause of proving a will and codicil in solemn form, promoted by the executor against the legal personal representative of the sole next of kin of the deceased, a compromise having been agreed to, by which a verdict establishing the will and codicil was to be taken by consent for the plaintiff, and the defendant was to receive £2,000 out of the estate: Held, that the Judge of the Court of Probate had jurisdiction to make the terms of the compromise a rule of Court, and to enforce it as such. Probate of the will and codicil was decreed to the plaintiff as executor, the terms of the compromise being embodied in the decree.—*Harvey v. Allen*, 151.

COPY OF WILL. *See* EXECUTION, 1.

CONSENT.

Consent of next of Kin to produce Will drawn by a Stranger in Blood, who was principally benefited.—Execution and Attestation by Mark.—Attesting Witnesses dead.

A will drawn by a person who was a stranger in blood to the testatrix, and executed by the testatrix and attested by two witnesses (both since dead) with their respective marks, no one else being present except the drawer, admitted to probate upon the consent of the next of kin being formally executed.—*In the goods of Louisa Edwards* (deceased), 10.

CONSTRUCTION.

1. *Construction.—Letters of Administration with Will annexed.—Grant de bonis non.—Effect of Decision in Court of Chancery.—Residuary Legatee.—Next of Kin.*

A. died in 1856, leaving a will on the construction of which, in respect to a question between B., the asserted residuary legatee, and C., the next of kin, the Judge of the Prerogative Court of Canterbury decreed letters of administration with the will annexed to C., the testator's sister and next of kin. A bill was subsequently filed in Chancery for the administration of the estate, in determining which, Wood, V.C., held that B. was the beneficial residuary legatee. Afterwards C. died, leaving goods unadministered, and a question arising in the Court of Probate as to the grant *de bonis non* between B. and another next of kin: Held, without going into the construction of the will, that the suit before Wood, V.C., was substantially an appeal from the decision of the Prerogative Court, and administration *de bonis non* was granted to B. in accordance with the decision in Chancery.—*Warren v. Kelson*, 290.

CONSTRUCTION—*continued.*

2. *Construction.—General Bequest, followed by Specific Bequests.—Universal Legatees in Trust.*

A. B. left in the hands of trustees, "all the property she might be possessed of at her death," etc., followed by an enumeration of properties, which however did not include the whole of her property. Held, that the specific enumeration did not restrain the general terms preceding it, and that the trustees were entitled to administration with the will annexed as universal legatees in trust.—*In the goods of Louisa Goodyar* (deceased), 127.

3. *Construction.—Will.—Power of Appointment under Settlement.—De facto Marriage with Deceased's Wife's Sister.*

In contemplation of marriage between A. and B. certain personal property of B.'s, the intended wife, was placed in the hands of trustees to hold in trust for her till marriage; then in trust for A. and B. during their respective lives; then for the children of the marriage; and if there be no issue, and in case B. should die in the lifetime of A., in trust for such persons as B. should by will appoint. A marriage *de facto* took place between A. and B. in July, 1842; but such marriage was void in law, B. being the sister of A.'s deceased's wife. In October, 1842, B. made a will confirming the settlement purporting to be made under the power therein contained, and by all other powers, etc., and left various legacies to be paid six months after the death of A., and thereby also disposed of the residue of the trust properties. A. died in December, 1846; after which part of the trust estate, consisting of money in the funds, was transferred to B.'s name, and securities in which other parts were invested were handed over to her; and she, with her solicitor's consent, destroyed the marriage settlement. B. died in January, 1857. The will was found a few days after her death among some title-deeds of property which had belonged to A.; but under the advice of counsel as to the invalidity of the will, C., her sister and next of kin, took out letters of administration to B. as dead intestate. The executors named in the will called in these letters of administration, and propounded the will: Held, that the will was valid under B.'s general power of testamentary disposition, though she might have made it, thinking it might operate under the settlement—her intention to benefit the legatees being clear, though she had certainly intended A. to take a life-interest in the property. Probate granted, and the costs of the defendant ordered to be paid out of the estate.—*Southall and Huxley v. Jones*, 298.

4. *Will.—Residuary Clause.—Failure of Mode of Application intended.—Costs.*

B. made his will in 1830, directing, after payment of debts, etc., and legacies, "all my remaining property to be placed in proper securities and appropriated to the education of my sister C.'s children, as shall seem most meet and beneficial to them, by the executors of this my will, recommending to them that the boys receive a classical education to fit them for the learned professions, and the girls to fit them for the purpose of teaching in respectable private families, or in schools of the first respectability." B. died in 1859, having survived his executors, leaving a brother and sister his only next of kin, and children of his sister C., all

CONSTRUCTION—*continued.*

grown up, surviving him. On a question as to administration with the will annexed, the Court held that C.'s children were entitled as beneficial residuary legatees, but gave the defendant, one of the next of kin, costs out of the estate.—*Present and Present v. Goodwin*, 544.

5. *Construction.—Will.—Residuary Clause.*—"Things."—*Administration (with Will annexed).*

In a will which contained specific bequests of several articles of plate, furniture, etc., the last specific bequest being that of £30: Held, that a bequest to R. S. "of the residue of my things" would not entitle R. S. to a grant of administration with the will annexed as residuary legatee.—*In the goods of Sophia Henderson Ludlow* (deceased), 29.

See WILL, 2.

COSTS.

1. *Costs.—Executor.—Next of Kin.—Proof of Will in solemn Form.—Plea.—Practice.*

A next of kin may generally put an executor on the proof of a will, and cross-examine the witnesses without making himself liable for costs, but if he pleads or takes any further step, he does so at his own risk. When a plea contains irrelevant matter, it should be objected to.—*Farlar v. Farlar*, 124.

2. *Costs.—Will.—Heir-at-Law cited.—Plaintiffs and Defendants.*—20 & 21 *Vict. c. 77, ss. 29, 61, 64, 65.*

A., B., and C., executors, propounded a will and two codicils. D., an executor under the will, opposed the second codicil, pleading undue influence and fraud, and that the testator was ignorant of the contents. E., the testator's heiress-at-law, being cited to see proceedings, entered an appearance. By an order made in chambers at the instance of the executors, she was required to plead or to be barred from ever disputing the will, and thereupon pleaded unsoundness of mind and undue influence as regarded the will and first codicil, as well as to the second codicil. The jury found a verdict for the plaintiffs on all the issues, and the Court condemned the defendants, generally, in the costs. On motion, on behalf of the heiress-at-law, to review the decree as to costs: Held, that the position of an heir-at-law, cited under s. 61 of the Probate Act, is similar to that of the next of kin when cited to see proceedings in the Prerogative Court, and that E. having placed the above pleas on the record, and having totally failed in proof of them, was liable to costs. That as between the defendants, each party was liable to that part of the costs which belonged to his own case. That where costs had been incurred in any matter equally applicable to both parties, so that the Court could not assign them more to one than the other, such portion of costs was to be taxed equally between them.—*Fyson and Others v. Westrope and Cutting*, 279.

3. *Costs.—Interveners.—Legatee.—Practice.*

A., B., and C., three legatees named in a codicil, sought probate of it in solemn form against the executors named in the will. Subsequently to their having propounded the codicil, D., another legatee, intervened. The executors by their replication, which was given in after D. had intervened, admitted part of the alleged codicil, including the legacy to D. Held, that D. was not entitled to have his costs out of the estate.—*Shawe and Dickins v. Marshall and Others*, 129.

COSTS—continued.

Costs.—Will.—Next of Kin.

Where the will in question was made under remarkable circumstances, and such as would have justified the next of kin in calling upon the executors to prove it in solemn form, the next of kin having put the executors to a very expensive trial, although she had previously received from them full and complete information respecting its execution, was held not entitled to have her costs out of the estate. The Court declined to make any order as to costs.—*Nichols and Freeman v. Binns*, 239.

Costs.—Will.—Next of Kin.—Executrix.

A., as a party entitled in distribution, and who was also heir-at-law, filed a bill in equity against B., the devisee and executrix of a will; and an issue, *devisavit vel non* was directed to be tried, which ultimately ended in a verdict for the executrix. Immediately after filing the bill, A. cited B. in the Prerogative Court of Canterbury to bring in the probate of the will which had been granted to her in common form. B. propounded the will and examined three witnesses, to whom A. administered unobjectionable interrogatories. The evidence was published on the prayer of A. just before the first trial of the issue at common law, and no further step was taken in the cause till the ultimate decision as to the real estate in favour of the executrix, when A. consented to probate being taken by B. On a question as to B.'s costs: Held, that though, under the circumstances of the will, A. would have been entitled to his costs out of the estate, if the suit in the Prerogative Court had been brought with the simple object of taking the opinion of that Court on the will, yet that as it appeared that the suit was brought with the view of eliciting facts and evidence to be used at the trial of the issue, A. ought not to be allowed his costs out of the estate.—*Swinfen v. Swinfen*, 283.

See **AMENDMENT**, 2.

4. *Pauper.—Costs.*

W. T. having obtained probate in common form of a paper professing to be the will of A. L., such probate, at the suit of the next of kin of the deceased, was revoked, the Court holding that the paper in question was not the will of the deceased, and that W. T. had been guilty of fraud in obtaining probate of it, and in contesting the suit. W. T., though suing *in formâ pauperis*, was condemned in costs.—*Carless v. Thompson*, 21.

5. *Costs out of Estate.—Points of Law.*

Where in opposition to a will the defendant relies upon difficult points of law, he will, though unsuccessful, be generally entitled to his costs out of the estate.—*Robins and Paxton v. Dolphin*, 517.

6. *Security for Costs.—Plaintiff Foreigner.—Tambisco v. Pacifico*, 7 Ex. 816.

The Court will not order the plaintiff to find security for costs when though a foreigner, he is staying in England at the time of the application, and there is nothing to lead to the supposition that he is on the point of leaving the country. His affidavit in opposition to such an application need not state an intention of permanent residence.—*Crispin v. Doglione*, 522.

See **TAXATION OF COSTS**, 1, 2.

COUNTY COURT.

Discretion of Judge of Court of Probate.

Where, in a probate cause, the County Court has jurisdiction, the Court may, though application be made on behalf of all the parties to the cause for it to be tried at the assizes, still, in its discretion, direct it to be tried in the County Court.—*Dunn v. Dunn*, 521.

CORPORATION.

Corporation Aggregate.—Executor.—Appointment of Syndic.—Administration with Will annexed.

When a corporation aggregate has been appointed executor of a will, the Court will, on motion, grant letters of administration with the said will annexed to a syndic, who has been duly appointed by such corporation to take the grant. The grant will not be made until the appointment of syndic is before the Court.—*In the goods of Elizabeth Darke* (deceased), 516.

CREDITOR.

Creditor.—Insolvent Estate.—Appointment of Guardian.—Administration.

A creditor appointed guardian to minors (the only children of E. P.), who had no known relations, for the purpose of taking out administration to the estate of E. P., who had died intestate and insolvent.—*In the goods of Elisha Peck* (deceased), 141.

Creditor.—Next of Kin.—Unfitness to administer.

Semble, a creditor applying for administration has no right to go into the unfitness of the next of kin to administer.—*Haynes v. Matthews*, 460.

DIOCESAN GRANT. *See* PRACTICE.

DIVORCE.

A Scotch Sentence of Divorce.—English Marriage.—Effect of Sentence.

A Scotch sentence of divorce will not dissolve an English marriage, where the parties to the marriage have retained their English domicile up to the date of the sentence.—*Robins and Paxton v. Dolphin*, 37.

A Scotch sentence of divorce, purporting to dissolve an English marriage, if not good for the purpose for which it was intended, cannot have the effect of a divorce *à mensâ et thoro*, so as to enable the wife to acquire a domicile independent of her husband.—*Ib.* 37.

DOMICIL.

Will.—Residence abroad.—Domicil of Origin.—Evidence.—Will in Execution of a Power.—Domicil for the purpose of Succession.—Burden of Proof.

Conversations and declarations, unless accompanying acts, are the lowest species of evidence of a change of domicile; they must not, however, be discarded, but must be duly weighed, together with the rest of the evidence. A will made in execution of a power must be executed according to the law of the domicile. For the purposes of succession, where there is an undoubted domicile of origin continued through many years, such domicile will be held to have been retained, unless there is evidence of an intention to abandon it, accompanied by acts sufficient to found the acquisition of a new domicile. The burden of proof is on the party who impugns the domicile of origin. For the purposes of succession a person

DOMICIL—*continued.*

can have but one domicil. Semble, by the law of France, a will made by a domiciled Frenchman during the most temporary residence in a foreign country, would be valid, if executed according to the law of that foreign country.—*Crookenden v. Fuller*, 442.

ERASURES. See PRACTICE, 2.

EVIDENCE.

Evidence of one attesting Witness sufficient.—Proof of Will in solemn Form.

To prove a will in solemn form in the Court of Probate, it is not necessary that both the attesting witnesses should be examined.—*Belbin v. Skeats*, 148.

See PROBATE, 3.

EXECUTION.

1. *Evidence of Execution.—Copy.—Will.*

A., being resident in India, sent in 1850 to England, in a letter to his solicitor, a copy of a will which he stated he had made there. In February, 1857, he transmitted in the same way a copy of a codicil stated by him to have been made at Delhi. A. lost his life in May, 1857, in the mutiny at Delhi, and the will and codicil were not forthcoming. On motion for probate of the will and codicil as contained in the copies sent to England: Held, that there being no proof of the execution of the original will and codicil, except the statement of the deceased himself, made after their execution, the copies were not entitled to probate.—*In the goods of John Peter Ripley*, 68.

2. *Execution.—Will.—Dispositive Words following Testator's Signature.*

A. produced to B. a sheet of paper, having on the first side a formal heading and ending of a codicil, and asked B. to write a codicil for her. B. not having finished the dispositive part when he reached the formal ending, turned over the page and continued the sentence and other dispositive clauses on the second side. On motion for probate, on suggestion that the writing on the second side might be considered as an interlineation, the Court refused to decide such a question on motion, but said the parties might propound the paper if they thought fit.—*In the goods of Martha Peach*, spinster (deceased), 138.

3. *Will.—Imperfect Recollection of the attesting Witnesses.—Presumption of due Execution.—Probate.*

A will, in the handwriting of the deceased, admitted to probate, although the attesting witnesses did not recollect whether it was signed by the testator, or his signature acknowledged in their presence.—*In the goods of John Holgate* (deceased), 261.

4. *Execution by Mark.—Will.—Wrong Name.*

A will, purporting to be that of S. Clarke, and delivered by her as such for safe custody to one of her executors shortly before her death, was executed by mark, against which appeared the name S. Barrell. Held, that there being no doubt as to the identity of the testatrix, her execution by mark was not vitiated by another person having written the wrong name against it.—*In the goods of Susanna Clarke* (deceased), 22.

EXECUTION—*continued.*5. *Execution.—Will.—No Attestation Clause.—Presumption of Execution.*

A. made her will in 1842. At her death there appeared the names of three subscribed witnesses, but no attestation clause. The only surviving witness, whose name stood first of the three, stated that the testatrix signed the will in his presence only; that he suggested the necessity of two witnesses, but could remember no more particular circumstances. Held, that the presumption of due execution was not rebutted by the affidavit of the surviving witness.—*In the goods of Jane Thomas* (deceased), 255.

See ATTESTATION, 1, 2.

EXECUTOR.

Executor.—Chain of Executorship.—Will of Feme covert.

A limited probate taken out of the will of *feme covert* will not continue the chain of representation under the general probate of the will of the original testator; but the Court will make a supplemental grant limited to the property which the *feme covert* had as executrix.—*In the goods of Rachael Bayne* (deceased), 132.

See SUBSTITUTED EXECUTOR.

FOREIGN GRANT OF ADMINISTRATION. See ADMINISTRATION, 10.

FOREIGNER A PLAINTIFF. See COSTS, 6.

GUARDIAN. See CREDITOR.

HEIR-AT-LAW.

Heir-at-law.—Citing Infant Co-heir.—61st and following Sections of 20 & 21 Vict. c. 77.

In a cause transferred from the Prerogative Court of Canterbury to the Court of Probate, before any allegation or declaration given in. Held, that the provisions of the 61st and following sections of the Probate Act, as to citing heirs-at-law, applied; that the intent of these clauses was to prevent double trials; and that the fact of one co-heir being an infant and child of a plaintiff was no ground for the Court refusing to allow such co-heir to be cited.—*Nicholls and Freeman v. Binns*, 19.

See COSTS, 2.

INCAPACITY.

1. *Incapacity.—Will.—Constraint.—Influence.*

The admission of a responsive allegation, pleading in the earlier part the personal and testamentary history of the testatrix, and in the latter part, that the paper in question was procured by her husband at a time when, by reason of extreme illness, she had not testamentary capacity, was opposed. Held, that the earlier part of the allegation, though in itself inadmissible as not affecting the issue, would, in combination with the averment of testamentary incapacity contained in the latter part, be such evidence as a judge could not properly withdraw from the consideration of a jury at a trial of the issue of testamentary competency, and must be therefore admitted to proof.—*Latham and Dee v. Woolbert*, 1.

INCAPACITY—*continued.*

2. *Incapacity of Testator.—Evidence.—Will.—Administration.*

E. R. J. made a will, whilst of unsound mind, in favour of some charitable institution. The only party interested to support it, being cited to propound it or show cause why it should not be treated as void, did not appear. On an affidavit of the medical attendant of the deceased as to his testamentary incapacity, administration was granted to one of his next of kin, as in an intestacy.—*Perry v. F. H. Dyke, Esq.*, 12.

3. *Incapacity.—Insane Delusion.—Will.*

B., a captain in the army, and having an appointment at Chatham, was attacked with illness in the beginning of August, 1857, which affected his mind. In the course of a fortnight he became better, and went on a visit to Lewes, where he remained till the last week in September, and apparently conducted himself quite rationally. About a fortnight before he left Lewes he received, after conference with and the approbation of the incumbent of the parish, the communion for the first time. He returned to Chatham on the 29th of September. On the 30th he wrote a testamentary paper which was executed by him, and attested by two brother officers on the 1st of October. He had immediately on his returning to Chatham shown symptoms of returning and reviving mental disease, which specially took the form of an uncontrollable idea that he must be eternally damned for having received the communion unworthily. A few days after the date of the will he was pronounced insane by a medical board, and died in September, 1858, in a lunatic asylum. Held, that a will, rational on the face of it, is shown to have been executed and attested in the manner prescribed by law, it is presumed, in the absence of any evidence to the contrary, that it was made by a person of competent understanding. But if there are circumstances in evidence, which counterbalance that presumption, the decree of the Court must be against its validity, unless the evidence on the whole is sufficient to establish affirmatively that the testator was of sound mind when he executed it. That though the will propounded was sensible on the face of it and contained no trace of any reference to or connection with the testator's then subject of delusion, yet that, as the production of an unsound mind, it was not entitled to probate.—*Symes v. Green*, 401.

See LUCID INTERVAL.

INCORPORATION.

INFANT. *See* HEIR-AT-LAW.

INSANITY. *See* INCAPACITY. LUCID INTERVAL.

Will.—Incorporation.

The Court will not extend the principle of incorporation of law as laid down by the Privy Council in *Allen v. Maddock*, 11 M. P. C. 11 426.—*In the goods of Edward Greves* (deceased), 250.

ISSUE.

Issue.—Trial before Judge of Assize.—Court of Probate.—20 & 21 Vict. c. 77, s. 38.

Application on behalf of a plaintiff to direct a cause to be tried at the coming assizes at Derby, refused. There is no similarity between the position of a plaintiff here, and his common law right to lay the venue where he pleases. A testamentary suit ought properly to be tried by the judge in

the Court of Probate, though he has a discretionary power to send an issue to be tried before a judge of assize.—*Cooper and Sparks v. Moss and Moss*, 143.

INTEREST. See BANKRUPT.

INTERVENERS. See COSTS, 3.

JOINT WILL.

Joint Will.—*Application for Probate.*

A. and B., partners in a farming business, and joint tenants in certain freeholds, executed a will containing various bequests and devises to take effect after the decease of both of them. On the death of A. (B. surviving) application for probate as of the will of A., was made by the executor therein named. Held, that probate of such an instrument could not be granted till after the death of both parties.—*In the goods of Joseph Raine* (deceased), 144.

LIMITED GRANTS OF ADMINISTRATION.

1. *Limited Grants of Administration to Cestuis que trust.*—*Consent.*

The Court will grant letters of administration to a *cestui que trust* of a trust-fund, limited to that fund, when the trustee in whose name the fund stands is dead, and is without a personal representative, the parties entitled to represent the deceased trustee having been cited before application was made for the grant. When there are several parties interested in the fund, the grant will be limited to the interest of the *cestui que trust* making the application, unless the other *cestuis que trusts* assent to the grant extending to their respective interests.—*Pegg v. Chamberlain and Others*, 527.

2. *Administration limited to substantiate Proceedings in Chancery.*—*Averment of Interest.*—15 & 16 Vict. c. 86. s. 44.

B. filed a bill in Chancery against C., D., and E., the trustees and executors under a Scotch probate and confirmation of the will of E., deceased, to set aside as fraudulent a purchase of certain shares in a Scotch company made by F. from B.'s wife, then a spinster, in 1839. When the bill was filed no part of the estate of F. was in England. To this bill a demurrer, on the ground that a legal personal representative of F. constituted by an English Court must necessarily be a party to the suit, was allowed and leave given to amend. B. then cited C., D., and E., to take probate or administration, etc., or to show cause why letters of administration limited as the Court might direct should not be granted to his nominee. C., D., and E. refused to take probate or administration, and contested B.'s right to letters of administration under any limitation whatever. Held, that the Court, in accordance with the practice of the Ecclesiastical Courts, will make such grants limited to substantiate proceedings in Chancery on a mere averment of interest, without in any way considering the merits of the case, and that the 15 & 16 Vict. c. 86, s. 44, does not apply to cases where the estate to be represented is the very estate to be administered in the suit.—*Maclean and Maclean v. Dawson and Others*, 425.

3. *A Grant of Administration limited to carry on a Suit in Chancery and to receive a particular Fund, the Subject-matter of the Suit.*

LIMITED GRANTS OF ADMINISTRATION—*continued.*

Where a party applying for administration has no direct interest in the personal estate of the deceased, but only as assignee of part of it, he cannot obtain a grant extending to the whole of the deceased's property; the grant must be limited to the particular fund to which he is entitled.—*In the goods of Christopher Dodgson* (deceased), 259.

4. *Limited Grant to Executor of the Party beneficially interested.*

A. made his will, having no property of his own, but being surviving trustee of a fund consisting of £1,105. 5s. stock, solely for the purpose of enabling B., to whom the reversion in the said trust-fund had been assigned, to receive the same. By the will he appointed B., his executors, administrators, and assigns, his sole executor. B. died in A.'s lifetime, having made a will whereof C., one of the executors, had taken probate. The Court being satisfied that A. knew and approved of the contents of his will when he executed it, granted probate of it to C., limited to the said trust-fund.—*Re Charles Axford*, 540.

5. *Limited Grant refused to a substituted Universal Legatee.*

An application for a grant of administration *de bonis non* (with the will annexed) to a substituted universal legatee, limited to £750 stock, in which she was solely interested, on an affidavit that the parties entitled to a general grant were more than nine in number, that their residences were widely apart, and that their service with a citation would be attended with great difficulty and expense, refused. Held, that the Court will not give a limited grant, except upon strong reason shown.—*In the goods of William Watts* (deceased), 538.

6. *Limited Administration.—Probate.—20 & 21 Vict. c. 77, s. 73.—Deeds.—Practice.*

It is not sufficient, in order to make out the title to a term of years, etc., with the view of obtaining administration, to refer to deeds, deducing such title in affidavits; the deeds themselves must be brought into the registry.—*In the goods of Francis Keene* (deceased), 265.

LIMITED PROBATE. *See* EXECUTOR.

LUCID INTERVAL.

Will.—Habitual Insanity.—Evidence of Lucid Interval.—Tests of Sanity.—Next of Kin.

W. P., who for many years had been afflicted with habitual insanity, accompanied with intermissions, executed a will when confined in a lunatic asylum. The instructions for it were designed and written by himself, without assistance, and the will made a natural and equitable distribution of his property. Probate of the will was opposed by the next of kin on the ground of the testator being of unsound mind at the time of its execution. The executors contended that it was executed by him during a lucid interval. The jury having found a verdict for the executors, probate of the will was decreed. Held, that where a person afflicted with habitual insanity, with intermissions, makes a will, the fact that the will is a rational one and made in a rational manner, though not conclusive, is strong evidence of its having been made in a lucid interval. That where a person is labouring under an insane delusion, his sanity is to be tested by directing his attention to the subject-matter of such delusions; but that where a person is afflicted with habitual insanity unaccompanied with de-

LUCID INTERVAL—*continued*.

lusions, his sanity is to be tested by his answers to questions, his apparent recollection of past transactions, and his reasoning justly with regard to them, and with regard to the conduct of individuals.—*Nichols and Freeman v. Binns*, 239.

LEGACY.

*Legacy.—Death of Legatee before Testator.—Child or other Issue.—*1 Vict. c. 26, s. 33.

To prevent the lapse of a legacy to a legatee, being a child or other issue, who may die in the lifetime of the testator, it is not necessary that the issue of the legatee who is alive at the death of the testator should be the same issue who was alive at the death of the legatee; it is sufficient that any issue—*e.g.* a grandchild of the legatee—should be in existence at the death of the testator. Such a legacy is a vested interest in the legatee, and passes to his representatives or under his will, as the case may be, and not to the issue, whose existence prevents the lapse.—*In the goods of Jane Parker* (deceased), 523.

NATURALIZED SUBJECT.

Naturalized British Subject.—Will.—Marriage abroad with deceased's Wife's Sister.—Disabilities.—No Revocation.

A., a native of Marburg, came to England in 1822, aged thirteen, and remained here till his death in 1856, having made occasional visits to Germany. In 1835 he was married in this country to B., a native of Frankfort-on-the-Maine; in 1836 he obtained letters of naturalization; in 1841 he made a will; in 1844 his wife died, leaving children, and in 1846 he married, at Frankfort, C., who was B.'s sister of the half-blood, and had children by her. On his death his brother took out letters of administration as the uncle and guardian of all the children, none of whom were of age, on the supposition that the will was revoked by the second marriage. The eldest son of the first marriage, on coming of age, called in the letters of administration, and set up the will. Held, that the principle laid down in *Brook v. Brook*, as to the disability of a native-born English subject to contract such a marriage, applied equally to a naturalized subject; that though, by the law of Frankfort, C.'s domicile, such a marriage would have been valid, yet the disability of either party to the contract would invalidate the marriage; that the letters of administration must be revoked, and the probate of the will granted.—*Mette v. Mette*, 416.

NOMINEES.

Grant of administration to nominees. See ADMINISTRATION, 9 and 11.

OBLITERATIONS. See PROBATE, 3.

OPPROBRIOUS TERMS omitted from Probate. See PROBATE, 4.

PAUPER.

Pauper.—Assignment of Counsel to.—Practice.

A person suing *in formâ pauperis*, to whom counsel has been assigned by the Court, cannot appear by another counsel, until there has been a renunciation or a new assignment of counsel, or until he has been dispaupered.—*Hamer v. Boreham*, 26.

See COSTS, 4. Liability for Costs. See COSTS.

PLEADING. *See* AMENDMENT.

POWER.

Appointment by Married Women under Power.—Nomination of Executors.—21 & 22 Vict. c. 95, s. 16.

Generally the nomination of executors in a testamentary paper purporting to dispose of real property only entitles the document to probate; but where a married woman, in execution of a power, devises real estate only, and names executors "of this my will," she, if she survive her husband without altering, revoking, or republishing such will, is intestate as regards any property not specifically mentioned therein, and such executors take nothing *jure representationis*. The next of kin is entitled to administration of the personal estate on oath that the deceased died intestate except as to real estate.—*O'Dwyer v. Geare and Another*, 435.

2. *Power.—Alleged Power.—Married Woman.—Will.—Execution of Power.*—*Barnes v. Vincent*, 5 Moore, P. C. 201.

B. died in 1857, leaving a testamentary paper, in her own handwriting, and signed by her, dated July, 1832, by which she bequeathed her whole property, whatever it might be, at her death, to her daughter. Under articles for a marriage-settlement, the trustees held certain property in trust for B.'s separate use during coverture, and after her decease, for such persons as B. should, by her last will, by her signed and published in the presence of and attested by three witnesses, appoint. In July, 1832, B.'s husband was alive, but predeceased her. The testamentary paper contained no reference whatever to the power, and was not published or attested. In the pleadings, the plaintiffs alleged that it was made in pursuance of a power, and the marriage articles giving some power were not disputed. Held, that *Barnes v. Vincent*, 5 Moore, P. C., was conclusive; that where a power is before it, and an averment that a testamentary paper was made in pursuance of a power, the Court is bound to grant probate of the paper, provided it is valid as a testamentary instrument, without examining into the due execution of the power, and thereby to leave it to the competent court of construction to decide whether the testamentary paper is a due execution of or operative under the power.—*De Chatelain v. Pontigny*, 411.

PRACTICE.

1. *Practice.—Diocesan Grant.*—*Bona notabilia without the Diocese.*—20 & 21 Vict. c. 77, ss. 86, 87, 88.

Administration to the goods of A. was granted in the Consistory Court of Lichfield, in September, 1857. The property was sworn under, and the duty paid upon £9,000. It was afterwards discovered that £3,000 Consols formed part of this amount. The Bank of England refused to register the letters of administration, which were void under the old law. It was now sought to take the opinion or direction of the Court as to the effect of ss. 86, 87, and 88 of the Probate Act on such a grant. No definite motion being made, the Court declined to give any opinion on the point.—*In the goods of John Elwell, jun.* (deceased), 27.

2. *Practice.—Erasures.—Substitution.—Probate in Blank.*

The testatrix after the execution of her will erased certain parts thereof, substituting in their places other words. Probate granted of the will with those parts erased in blank, the original words not being discernible on

PRACTICE—*continued.*

the face of the paper, and there being no evidence to show what they were.—*In the goods of Elizabeth Stone James* (deceased), 238.

3. *Practice.—Intestacy.—Administration Bond given to the Bishop of Chester.—Quære, whether the obligation survives to the Judge of the Court of Probate.*

An administration bond with sureties was given to the Consistory Court of Chester, in 1854. In January, 1857, the Master of the Rolls directed the bond to be put in force in an action at law against the sureties. Before the requisite steps could be taken, the testamentary jurisdiction of the Court of Chester had ceased by virtue of the operation of the Probate Act. On motion to order the bond to be attended with, for the purpose of being put in suit at common law, the Court directed one of the registrars to assign it for that purpose; but *quære* as to its effect at common law.—*Young v. Oxley*, 25.

See LIMITED GRANTS, 6.

4. *Practice.—Proof of Will in solemn Form.—Several Defendants.—Counsel.—Evidence.*

Where an executor propounds a will in solemn form, and there are several defendants whose case on the pleadings is substantially the same, the Court will hear counsel only for one defendant.—*Palmer v. Maclean and M'Grath*, 149.

5. *Practice.—Transference of Jurisdiction.—Affidavit.*

A requisition had issued to New South Wales, under seal of the Prerogative Court of Canterbury, to swear an administrator. Held, that the Court of Probate can decree letters of administration on an affidavit so sworn.—*In the goods of Frederick Bedwell* (deceased), 15.

PRESUMPTION.

1. *Presumption of Death at Sea.—Administration.—Advertisements in Newspapers dispensed with.*

W. T. N., a settler in New Zealand, embarked July 1st, 1856, in a vessel bound for Sydney, on his way to England. The vessel never reached Sydney, and no intelligence, after inquiries had been instituted, having been obtained as to the vessel, or any of those on board, she was supposed to have foundered at sea in some heavy gales, which occurred at the time she was making the voyage in question. Held, that the death of W. T. N. was to be presumed, and that advertisements in newspapers for persons supposed to be dead may be dispensed with, when their history is known and traced to within a short period of their being last heard of.—*In the goods of William Thomas Norris* (deceased), 6.

2. *Presumption of Death at Sea.—Administration.—Payment of Policy by Underwriters.*

A. M. sailed in the *Brevet*, on the 27th of January, 1857, for Valparaiso. The voyage should have been made in ten weeks. Nothing had been heard of either the *Brevet* or crew since she left Liverpool. The *Brevet* was insured, and the underwriters had paid the policy thereon, as upon a total loss. Held, that the death of A. M. was to be presumed; that payment of the policy by the underwriters was strong evidence in favour of such presumption.—*In the goods of Andrew Main* (deceased), 11.

PRESUMPTION—continued.

3. *Presumption of Death at Sea.—Lapse of Time insufficient.—Inquiries after Crew of lost Vessel.*

H. B., on the 20th of October, 1858, sailed in command of a vessel from Demerara, bound to London. Nothing having since been heard of the vessel, she was supposed to have foundered at sea with all her crew. On application for a grant of administration to the widow of H. B.: Held, that the time which had elapsed since the vessel sailed being only five months, the application was premature; that inquiry should be made at Demerara whether anything had been heard of any of the crew who might have survived.—*In the goods of Henry Bishop* (deceased), 303.

4. *Presumption of Death of Husband.—Will.—Married Woman.*

A. arrived at Albany, in the state of New York, from England, in April, 1850, and from that date, though inquiries had been made, he had never been heard of. His wife died in England in February, 1857, leaving a will dated January, 1857. Probate granted to her executor as of the will of a widow.—*In the goods of Elizabeth How* (deceased), 53.

5. *Desertion of Husband.—Protection Order.—Administration granted to the Wife's Next of Kin of such Property as had been acquired by her after the Desertion.*

M. W. having been deserted by her husband, obtained a protection order, under 20 & 21 Vict. c. 85, s. 21, by reason of such desertion. On her death, in the life of her husband, intestate, the Court decreed letters of administration to be granted, limited to such personal property as she had acquired or become possessed of since the desertion, without specifying of what that property consisted, to one of her next of kin.—*In the goods of Maria Worman* (deceased), 513.

PRINCIPLES OF COURT OF PROBATE. See ADMINISTRATION, 14. PROBATE.

1. *Probate.—English Domicil.—Personalty in Scotland.—Sect. 14 of Confirmation and Probate Act, 1858.*

A note or memorandum of the domicil of the deceased cannot, under s. 14 of the Confirmation and Probate Act, be indorsed on the probate after it has issued. The Court will not revoke a probate which has been rightly granted, and has not been taken out under a mistake.—*In the goods of James Muir* (deceased), 294.

2. *Executed and unexecuted Testamentary Papers.—Reference.—Parol Evidence.*

B. produced a sealed envelope, on which was written, "I confirm the contents written in the enclosed document in the presence of," etc. This was signed by her, and attested by two witnesses. On her death, two days subsequently, the envelope, still sealed with the same seal, was found on her table directed to J. A., her nephew; on being opened, it was found to contain a testamentary disposition in the form of a letter addressed to her nephew. The Court admitted parol evidence of the identity of the enclosure so found after death with the document referred to by the executed memorandum, and granted probate of the envelope and contents to J. A., as executor according to the tenour.—*In the goods of Ann Almosnino* (deceased), 508.

3. *Probate.—Appointment of Executor.—Unexecuted Obliteration and Substitution.—No Revocation.*

PROBATE—*continued.*

Where an appointment of an executor is made in a duly executed will, and the testator, having expressed his intention of so doing, obliterates the original name and substitutes another, such obliteration and substitution being unexecuted, the Court will direct the original name to be restored in the probate, if it is satisfied by evidence *aliunde* what the original name was.—*In the goods of Henry Harris*, 536.

4.—*Probate.—Opprobrious Terms.*

Expressions supposed to reflect on some of the defendants in the suit were with the consent of the plaintiff's counsel directed to be omitted from the probate.—*Marsh and Others v. Marsh and Others*, 528.

5. *Codicils.—Presumption as to what Papers form part of a duly executed Will.—General revocatory Clause of all former Wills.*

When several sheets of paper, constituting a connected but not in all points a consistent disposal of the property, are found together, the last sheet being duly executed, the presumption, in the absence of direct proof, is, that they all formed the will of the deceased at the time of execution.—*Ib.* 528.

6. *Probate.—Will.—Probate Duty.*

Probate was taken out in the Prerogative Court of Canterbury, to cover property, part of which was afterwards discovered to be without the province (in the diocese of Chester). Semble, such grant is valid as regards the property in Chester under 20 & 21 Vict. c. 17, s. 87, on condition of the same amount of duty being paid, as would have been paid before this Act came into operation, if a separate grant had been taken out in Chester.—*In the goods of George Freckleton* (deceased), 16.

7. *Probate.—Paper not Testamentary on the face of it.—Evidence of Testamentary Intention*, 542.

B. having been informed that he could not recover from the illness he then laboured under, expressed a wish that his wife should be in a position to receive, at his death, certain sums of money in savings-banks, and signed, in the presence of witnesses, two orders on a savings-bank, to pay to his wife, at any time she might apply for the same, any money deposited. B. died on the following day. The Court granted administration with the two orders as together containing the will of B. annexed, to his widow.—*In the goods of Peter Marsden*, 542.

RENUNCIATION.

Renunciation of Executors and Residuary Legatees in Trust.—Administration de Bonis Non.—Practice.

Where the executors and residuary legatees in trust had renounced probate or administration, and administration with will annexed had been granted to the residuary legatee for life, who died, leaving the estate unadministered, the Court refused to allow one of the residuary legatees in trust to renounce in that character, for the purpose of taking administration with will annexed of the unadministered estate.

RESIDUARY LEGATEE. *Grant Refused.* See ADMINISTRATION, 12. CONSTRUCTION, 4, 5.

REVIVAL.

1. *Revival.—Effect of Annexation of Codicil to a former Will revoked.*—1 Vict. c. 26, s. 22.

REVIVAL—continued.

The physical annexation (by a piece of tape, *e.g.*) of a duly executed codicil of later date to testamentary papers, duly executed but revoked, is no ground for inferring the "intention to revive," required by 1 Vict. c. 26, s. 22. Semble, such intention can only be shown by the contents of the codicil itself.—*Marsh and Others v. Marsh and Others*, 528.

2. Revival of Will by Codicil.—Revocation of Will by Marriage.—Memorandum.

James T. made a will, leaving the life-interest in his property to his wife S. She died, and he subsequently intermarried with M. On the day before his death he told an attendant that he wished the name of S. to be erased in his will, and M.'s name to be substituted for it, and requested her to write a memorandum on his will to carry out his wishes. The attendant thereupon wrote a memorandum upon the will, which was executed according to the provisions of 7 Will. IV. & 1 Vict. c. 26. The memorandum did not in direct terms refer to the will. Held, that the memorandum operated as a codicil to the will, so far as to revive the will.—*In the goods of James Terrible* (deceased), 140.

REVOCATION.

1. Revocation of Will.—Custody of Testator.

A. made his will, being in extreme illness, on December 15, and placed it in his mother's custody. At his request his mother gave it to him on the 21st. On the 22nd he died, and the will was found under the bolster of his bed, with the signatures and attestation clause torn off; the latter was nowhere to be found. A. had expressed no dissatisfaction with his said will. On motion for probate of the paper to his widow as executrix, held that the will was revoked.—*In the goods of Samuel William Lewis* (deceased), 31.

2. Revocation of second Will.—Effect on prior Will.

The destruction of a second will, itself revoking one of prior date, does not reinstate the first will, even though it be in existence at testator's death. Parol evidence admitted as to the contents of the second will.—*In the goods of William Brown* (deceased), 32.

3. Revocation.—Execution of a Power by Will.—General Revocatory Clause in latter Will.—7 Will. IV. & 1 Vict. c. 26, s. 27.

E. H., a married woman, in 1846 duly made a will in execution of a general power of appointment, disposing of certain stock, and appointing executors thereof. In 1855 she made another will, without the consent of her husband, disposing of certain other property under her marriage-settlement, and of other articles; it did not refer to the general power, under which the will of 1846 was made, nor to the stock thereby appointed; but it contained a general revocatory clause, and named a different executor. Held, that the 27th section of the Wills Act was intended to enlarge the dispositive power of testators, and has no bearing on questions of revocation; that the revocatory clause in the will of 1855, being in general terms, and containing no reference to the general power in execution of which the will of 1846 was made, or to the property thereby appointed, did not operate to revoke that will.—*In the goods of Elizabeth Merritt*, 112.

REVOCAATION—*continued.*4. *Revocation of Will.—English Marriage.—Scotch Divorce.—Bonâ fide Domicil.*

A., a domiciled Englishman, married B., an Englishwoman, in England. Differences having arisen between them, a separation by mutual agreement took place. A. having subsequently to their separation gone to Scotland, but without any apparent intention of making that country his permanent residence, committed adultery there. The Lords of the Court of Council and Session, when he had been resident in Scotland for nearly six months, at the suit of B., his wife, made a decree dissolving their marriage by reason of his adultery. B. subsequently in due form married a domiciled Frenchman, and died resident in France. Shortly before her death she made at Paris a holograph will, valid according to the law of France, revoking all previous wills. Held, that A., by his residence in Scotland, did not acquire a Scotch domicil, so as to distinguish this case from *Lolley's case*, 1 Russ. & R. C. C. 237, and *Conway v. Beazley*, 3 Hagg. Ecc. Rep. 639; and that the English marriage of A. and B. was not dissolved by the Scotch decree of divorce. That a Scotch sentence of divorce, purporting to dissolve an English marriage, if not good for the purpose for which it was intended, could not have the effect of a divorce *à mens et thoro*, so as to enable B. to acquire a domicil independent of that of A., her husband. That B.'s domicil being at the time of her death English, the will she executed at Paris, not having been executed according to the law of the country of her domicil (England), was inoperative to revoke a previous will and codicil made by her in pursuance of a power and in conformity to 7 Will. IV. & 1 Vict. c. 26.—*Robins and Paxton v. Dolphin*, 37.

5. *Revocation of Will.—Marriage and Birth of a Child.*

A., in 1828, made his will in contemplation of his intended marriage, providing for his intended wife and for the children of such marriage, and making his intended wife executrix. Held, that the marriage which ensued, together with the birth of a child, operated as a total revocation of such will.—*In the goods of Thomas Cadywold* (deceased), 34.

6. *Revocation.—Will.—Codicil.—Clerical Error by the Attorney who prepared the Codicil.*

The deceased duly executed a will, wherein he named three persons executors; he subsequently instructed his attorney to prepare a codicil to this will, for the sole purpose of altering two bequests therein contained. The attorney, in drawing the codicil, concluded with the following paragraph—"and in all other respects I *revoke* my said will," intending to have written for the word "*revoke*," "*confirm*." The codicil was read over to the deceased, and executed with the clause as originally drawn. Held, that there was not sufficient ambiguity on the face of the codicil to authorize the admission of parol evidence of the deceased's intention.—*In the goods of Robert Davy* (deceased), 262.

7. *Revocation of Will.—Execution.—Power of Appointment by Will.—Marriage.—7 Will. IV. & 1 Vict. c. 26, s. 18.*

A. had, under his marriage settlement, in the event of his surviving B. (his wife), a power of appointing by deed or will amongst his children certain trust-moneys, and in default of appointment the moneys were to be

REVOCATION—*continued.*

equally divided amongst them. A. survived B., and by a will executed in 1847, he being then a widower, amongst other things, directed the then unappointed portion of such moneys to be equally divided amongst his sons, a portion of such moneys having been previously assigned to his only daughter on her marriage. A., in 1855, contracted a second marriage, and died in 1858, without having executed any subsequent will, or any further appointment of the trust-moneys. Held, that the will of 1847, so far as it was in execution of the power of appointment, was not revoked by A.'s second marriage, though the same persons would take under the settlement, in default of appointment, as would have taken in case of an intestacy under the Statute of Distributions.—*In the goods of Sir Charles Fitzroy, Knt.* (deceased), 133.

8. *Revocation of Will.—Mutilation.—Insanity.—Onus probandi.*

When there was satisfactory evidence of the due examination of a will by a testatrix who subsequently became insane, and the will was found mutilated: Held, that the onus of showing that it had been mutilated by her when of sound mind was upon the party alleging its revocation.—*Harris v. Berrall*, 153.

9. *Revocation of Will.—Presumptive Revocation of Codicil.*

A. made her will in March, 1854, and a codicil in June, 1854, one of the legatees under the will having died since its execution. In May, 1856, she executed another codicil, appointing, among other things, one of the parties benefited in the codicil of 1854 to be executor, in the room of one appointed in the will. At her death, in December, 1857, the will and second codicil were found in a tin box at the Bank of England, in which she kept her papers; but the first codicil, of which the testatrix took possession immediately after its execution, was nowhere to be found. On motion for probate of the draft of the first codicil, with the consent of the residuary legatees: Held, that the *prima facie* presumption of revocation was strengthened rather than rebutted by the circumstances. Probate of the draft refused.—*In the goods of Mary Shaw*, spinster (deceased), 62.

10. *Revocation of Will presumed.*

T. G. duly executed a will on six or eight detached sheets of paper. At the time of execution he subscribed his name at the foot of each sheet in the presence of the attesting witnesses, who thereupon also subscribed in his presence each sheet. On his death, two of the middle sheets of the will only were found amongst his papers, and there was no trace of the remaining sheets. On motion to decree letters of administration with these sheets as the will annexed: Held, that the signatures at the end of the will, being the only ones that satisfied the Wills Act, having been destroyed, the will must be presumed to have been revoked.—*In the goods of Thomas Gullan* (deceased), 23.

11. *Revocation of Will by Tearing.—Intention.—Act to carry into effect.*

A., having previously expressed his intention to make a new will, and leave all his property to the principal legatee in the existing will, sent for the will, and tore it almost in two, but was stopped by the exclamations of persons in the room as to the danger of destroying the existing will before

REVOCATION—*continued*.

making another. A. let the will fall on the ground, but in a few minutes picked it up and refused to burn it; it was replaced in his drawers upstairs; and a few days afterwards, being about to sail for India, he burnt certain papers, but not the will, to which his attention was at that time directed; he afterwards showed a paper, which he called his will, to the principal legatee. He sailed for India, still expressing his intention of making a new will. After his death the torn will was found in the house in Wales in which he had been staying. Held, that in order to revoke a will by tearing, it is not necessary to rend the will into more pieces than it originally consisted of, but that it is sufficient, if the testator intended the tearing actually done of itself to work a revocation without any further act; that there being satisfactory evidence that the paper had been duly executed, and no evidence sufficient to prove that by the partial tearing the testator had carried into effect the original intention he had had to revoke it, the instrument was entitled to probate.—*Elms v. Elms*, 155.

12. *Revocation of Will.—Will not forthcoming at Testatrix's Death.—Presumption of Revocation rebutted.*

The presumption of fact, that a will, known to have been in the testatrix's custody, and not forthcoming at her death, was destroyed by her *animo revocandi*, is a *prima facie* presumption only, and may be rebutted by probable circumstances, among which declarations of unchanged affection and intention have much weight. It is not necessary for the parties seeking probate, having proved the *factum* of the original instrument, and given secondary evidence of its contents, to show how the original instrument was in fact destroyed or lost.—*Patten v. Poulton and Others*, 55.

13. *Dependent relative Revocation.—Will.—Undue Execution of a later Will.—Destruction of the former Will.—Revocation not sustained.*

A will was destroyed by the testator, on the supposition that he had substituted another for it, but which was not duly executed. Probate of a copy of the first will granted.—*Scott v. Scott*, 258.

See MARRIAGE WITH A DECEASED WIFE'S SISTER.

SEPARATE PROPERTY.

1. *Separate Property.—Will.—Wife.—Husband.—Separation by consent.*

A. and B. married in 1811; in 1817 they verbally agree to separate, and not to interfere with each other, and divided their then furniture and effects. They never again cohabited, and the wife supported herself by her own industry, and acquired property, which she disposed of by will in 1856. Probate of this will was opposed by the husband, who asserted his marital right to his wife's property. Held, that under the circumstances, the property had been acquired to the wife's sole and separate use, and that the *jus disponendi* would therefore attach to such property.—*Haddon v. Fladgate*, 48.

2. *Separate Property.—Will of Married Woman.—Effect of Will during Coverture by a Wife who survives her Husband.*

B. S. died on the 19th of January, 1858, two days after her husband's

SEPARATE PROPERTY—*continued.*

death, leaving a will made during his coverture, which had not been republished after her husband's death. R. S. had no power under any instrument to make a will during coverture. At the time of the death of her husband and herself, there was invested in the husband's name in the Three per Cent. Annuities with moneys of his, a sum of money which had always been treated by the husband and wife as her separate property, the same being the savings of the wife of presents made to her by her husband. By his will the husband declared that the said sum was the property of the wife. Held, that the said moneys were the separate estate of the wife, her husband being as to them a trustee for her, and consequently might be disposed of by a will made during her coverture; but that as she survived her husband, probate should be granted, limited to such property as she had power to dispose of.—*In the goods of Rebecca Smith* (deceased), 125.

See ADMINISTRATION, 2.

SUBSTITUTED EXECUTOR.

Substituted Executor in case of Death of one of the original Executors.

A. made a will, and appointed B., C., D., and E., executors, and in case of the death of B., F. to be executor in his place. B., C., D., and E. proved the will. B. and C. died. F. applied to have a double probate granted to him. D. and E. opposed such grant. Held, that F. was entitled to the grant, and that the casualty was not restricted to the death of B. in A.'s lifetime.—*In the goods of Henrietta Johnson* (widow, deceased), 17.

SURETIES.

1. *Sureties.—Administration Bond.—Amount.*—20 & 21 Vict. c. 77, ss. 81, 82.

A. died intestate, leaving his mother solely entitled in distribution,—property under £3,000,—and debts £45. The Court granted administration on the mother entering into a bond in the amount of £100, with sureties.—*In the goods of Matthew Gent* (deceased), 54.

2. *Sureties.—Justifying.*

Where a grant was made to persons representing three-fourths of the interest, but which was opposed by the person representing the remaining fourth, their sureties were ordered to justify to the extent of the remaining fourth.—*Iredale v. Ford and Bramworth*, 305.

See ADMINISTRATION BOND, 1, 2.

SURVIVORSHIP.

Administration.—Death of Husband and Wife.—Uncertainty as to Survivorship.—Form of Oath.

F. W. perished with his wife and only child, an infant, in the Cawnpore massacre, leaving no will. There being no evidence as to survivorship, the Court granted administration of the personal estate of F. W., as having died a widower, to his mother, as his next of kin. The administrator's oath, instead of being in the usual form, may state that there is no reason to believe that the wife survived the husband.—*In the goods of Frederick Wainright*, 257; *In the goods of Lieutenant-Colonel Ewart*, 258.

TAXATION OF COSTS.

1. *Taxation of Costs*, 20 & 21 Vict. c. 77, s. 29.—*Number of Counsel allowed.—Discretion of Registrar.—Costs of Application.—Practice.*

In taxing a bill of costs, the registrar is not bound by the practice of the Prerogative Court as to the number of counsel to be allowed, but should exercise his own discretion in the matter. In making an allowance for briefs, he should consider whether they have been made unnecessarily long and expensive. The question brought before the Court on this application having been raised by the registrar, costs of the application were not allowed against the plaintiffs.—*Braine v. Braine and Braine*, 271.

2. *Will.—Verdict and Costs for Defendants.—Taxation thereof.—Practice.*

A. propounded a will of April, 1858, and was opposed by B. and C., executors of a will of April, 1847. Verdict for the defendants, and A. condemned in their costs. B. and C. objected to the registrar's taxation of costs, disallowing, first, sixteen witnesses out of twenty-seven who were not examined by the defendant's counsel, though their evidence was briefed, and they were in Court; secondly, two witnesses out of the eleven examined as immaterial to the issue; thirdly, the third counsel and brief; fourthly, consultation at end of plaintiff's case. The Court confirming the registrar's taxation, except as to the second point: Held, that the fact which the two witnesses were called to prove was material to the issue, but that, as it was not a fact controverted in the case, it would have been sufficiently proved by one witness, and the costs of one were allowed accordingly. That the Court will not interfere with the registrar's discretion as to number of counsel to be allowed, and more than one consultation in the progress of a cause is never allowed.—*Edwards v. Payne and Reeve*, 276.

WILL.

1. *Will in the Registry of the Court.—Application to allow it to be sent Abroad.—Practice.*

A. by her will devised to B. certain lands in Australia. A suit was commenced by B. in the Supreme Court of Australia, to recover possession of such lands. An application on behalf of B., that the original will, which was deposited in the Principal Registry of the Court of Probate, should be delivered out of it for the purpose of being sent to Australia, to be used as evidence in the suit was refused.—*In the goods of M. Holl* (deceased), 136.

The Court will not allow a will in its custody to be taken out of its jurisdiction on any alleged necessity for the furtherance of justice. It must presume that other Courts, when satisfied that the original document is withheld by a competent authority, will not allow a suitor to be prejudiced by its non-production.—*In the goods of Biagio Manfredi* (deceased), 135.

2. *Will.—Domicil.—Probate.—Court of Construction.*

A., a natural born British subject, died domiciled in Russia, having acquired large property, both real and personal, in that country; he was also possessed of a considerable sum in the English funds. He left a will in the

WILL—*continued.*

Russian language and form, appointing Russian subjects executors, which was duly authenticated in the Russian courts. It purported to "dispose "of all my movable and immovable property." There were no words distinctly excluding any part of his property from its operation, nor was there any allusion to, nor any words distinctly describing, the money in the English funds: Held, that the executors, being clothed with the authority of the competent Court of the testator's domicile, were entitled to probate as regards the money in the English funds. *Semble*, where the Court of Probate has any doubt on a point of construction, it will so decide as will best enable the parties concerned to have recourse to the tribunal, whose more special duty it is to put a construction on testamentary papers.—*Enokin and Others v. Wylie*, 118.

3. *Will.—Memorandum.—Codicil.*

A. executed his will in February, and a codicil on the same paper in December; below the signature to the will, and before the commencement of the codicil, appeared a memorandum, which, from the evidence of the solicitor who prepared the will, had been written on the paper before the execution of the will: Held, that the memorandum being no part of the will as originally executed, was not entitled to probate by reason of the duly executed codicil of subsequent date, such codicil referring merely to the will.—*In the goods of John P. Willmott* (deceased), 38.

4. *Will.—Probate of Missing Will.*

G. made his will in 1855, appointing his wife sole executrix. In May, 1857, he fled from Delhi when the mutiny broke out, leaving there a desk containing the will. After the recapture of Delhi, an attempt was made to recover it, but without success. G. died in June, 1857. On proof of the due execution of the will and of its contents, the Court granted probate to the executrix.—*In the goods of H. C. Gardner* (deceased), 109.

INDEX TO DIVORCE CASES.

ADJOURNMENT.

Power of the Court to adjourn the hearing of a petition for further evidence or consideration.—*Ward v. Ward*, 185; *Robinson v. Robinson and Lane*, 384; *Lloyd v. Lloyd and Chichester*, 569.

ADMISSION

Of guilty respondent may be sufficient evidence against the person making such admissions to found a sentence of dissolution.—*Robinson v. Robinson and Lane*, 362.

ADULTERY. See CONDONATION.

1. The wife petitioned for dissolution by reason of the husband's adultery and cruelty, and bigamy and adultery; she had obtained a sentence of divorce in the United States, North America, where she and her husband, English subjects by origin, had resided, by reason of her husband's adultery with G. The only adultery proved at the hearing of the petition was the cohabitation of the respondent with G. subsequently to the sentence of divorce, to whom he was then married; and the Court dismissed the petition.—*Palmer v. Palmer*, 551.
2. An act of adultery by the wife condoned, no bar to the husband's petition by reason of her subsequent adultery.—*Wilton v. Wilton and Chamberlain*, 563.

AFFIDAVIT.

1. Affidavit, required by 20 & 21 Vict. c. 85, s. 41, and by Rule 2, to verify the facts of the petition cannot be used as evidence by the petitioner at the hearing.—*Deane v. Deane*, 90.
 2. Must go to all the facts in the petition either absolutely or to the best of knowledge and belief, as the case may be.—*Tourle v. Tourle and Another*, 165.
 3. The affidavit to verify answer, Rule 15, must go to all new facts introduced by the answer though not necessarily in absolute terms.—*Ibid.*
 4. Affidavit in verification ought not to detail the matrimonial history of the parties; the Court will not order such an affidavit to be taken off the file, but its costs would probably not be allowed on taxation.—*Forster v. Forster and Evans*, 167.
 5. Where the petitioner had obtained a divorce *à mensâ et thoro*, and damages in an action for crim. con., the facts of the petition were allowed to be proved by affidavit.—*Ling v. Ling and Croker*, 180.
But not where nominal damages only had been recovered.—*Potts v. Potts and Another*, 181.
- On a petition for dissolution the Court allowed the marriage to be proved by affidavit, the witnesses residing in Scotland, and no appearance being given for either respondent.—*M'Kechnie v. M'Kechnie*, 550.

AGREEMENT.

On a suit for restitution coming on for hearing before the Judge Ordinary without a jury, counsel on both sides stated that they had agreed to a compromise, and the hearing did not proceed; subsequently the petitioner moved that the cause might be heard, and the Court held that as the cause remained on the books simply, it was bound to hear it.—*Hayward v. Hayward*, 333.

On certain issues in a suit for judicial separation coming on for trial before a jury, a memorandum of agreement to arrange differences out of Court by reference, etc., was signed by counsel, and the jury dismissed; the Court subsequently rejected a motion for leave to re-enter the record and set down the cause for trial, holding the party bound by the agreement that the record should be withdrawn, proceedings stayed, and suit not further moved.—*Hooper v. Hooper*, 602.

ALIMONY.

1. Application to reduce permanent alimony rejected.—*Saunders v. Saunders*, 72.

Application to reduce alimony *pendente lite* rejected.—*Shirley v. Wardrop*, 317.

2. The husband may deduct from income derived from real property the expense of ordinary current repairs, but not of extraordinary and permanent improvements which ought to be charged on the fund of the income; the husband is liable for reasonable expenses incurred by the wife till the decree for alimony *pendente lite* is made.—*Hayward v. Hayward*, 85.

Alimony *pendente lite* on husband's petition for dissolution, under the circumstances, at the rate of an allowance under deed of separation.—*Weber v. Weber and Pyne*, 219.

3. On a decree of judicial separation by reason of the husband's adultery, the Court gave permanent alimony at the rate of £80 per annum on an income of £164, the children, eight in number, remaining with the mother.—*Deane v. Deane*, 93.

4. Application for alimony *pendente lite* where the husband does not appear, ruling in *Tomkins v. Tomkins*, 163. Altered by Rule 9, January, 1860.

Evidence may be produced by wife before alimony decreed.—*Tomkins v. Tomkins*, 172, *in notis*, varied by Rule 13, January, 1860.

5. Permanent alimony on dissolution at suit of wife.—*Robotham v. Robotham*, 190.

Annuity by way of permanent alimony to the woman on decree of dissolution by reason of her adultery.—Conditions.—*Keats v. Keats and Montezuma*, 358.

Application for maintenance of the woman on decree of dissolution by reason of her adultery refused.—*Ratcliff v. Ratcliff and Anderson*, 474.

6. Permanent alimony on a sentence of judicial separation by reason of the wife's cruelty refused.—*White v. White*, 593.

7. Alimony *pendente lite* at the rate of 4s. a week, the husband being a bricklayer at weekly wages. Attachment to enforce payment refused, *fi. fa.* granted.—*Ward v. Ward*, 484.

AMENDMENT.

Where the wife petitioned for dissolution on the grounds of adultery and

AMENDMENT—*continued*.

desertion, and the husband had not answered, she was allowed to amend her petition by inserting a charge of cruelty, the Court being satisfied by affidavit of the circumstances under which it was not included in the original petition.—*Bowley v. Bowley*, 487.

CHILD.

The Court has power to make interim rules and orders upon a final decree (20 & 21 Vict. c. 85, s. 35), and after a final decree upon application by petition (22 & 23 Vict. c. 61, s. 4), as to the custody, maintenance, and education of the children of the marriage which is the subject of the suit or decree.

1. The application is to the discretion of the Court, and does not depend upon the common law rule of the father's right to the custody, or on any rules which have obtained in Courts of Equity.—*Spratt v. Spratt*, 215; *Marsh v. Marsh*, 315.
2. On application for an interim order the Court will not disturb the custody of children if they are under the control of persons reasonably impartial between the parties, and children of a tender age will generally be placed in the mother's custody; the expense of maintenance will be considered, and generally access at proper times ordered.—*Curtis v. Curtis*, 75; *Spratt v. Spratt*, 215; *Boynton v. Boynton*, 324.
3. Where the wife succeeds in her suit she is generally entitled to the custody of the children to the age of fourteen, though no misconduct on the part of husband towards the children is shown, regard however being had to the means of education and maintenance.—*Marsh v. Marsh*, 312; *Suggate v. Suggate*, 492.
4. The permanent custody of children should form part of the prayer of the wife's petition for judicial separation, etc.—*Seymour v. Seymour*, 332. But the Court will not at the hearing of the principal petition go into evidence of misconduct towards the children with the view of determining the question of their custody, but if necessary will hear evidence on that point after the decision of the principal suit.—*Suggate v. Suggate*, 489, 494.
5. On the husband's petition for dissolution the Court included in its decree an order on the wife (who appeared to be a very profligate woman) to deliver up the custody of a child rather than put the father to the expense of enforcing his common law rights by *habeas corpus*.—*Boyd v. Boyd and Collins*, 563.

CITATION, SERVICE OF. See PETITIONER, 3.

COLLUSION.

A petition for dissolution will be dismissed though adultery be proved if the Court is satisfied that the petition is prosecuted in collusion with either of the respondents.—*Lloyd v. Loyd and Chichester*, 567.

COMPENSATION.

The doctrine of the canon law, *paria crimina mutua compensatione delentur*, has not been adopted as part of matrimonial law of England.—*Hope v. Hope*, 94.

CONDONATION.

1. If set up in answer to a petition must be verified by affidavit.—*Tourle v. Tourle and Another*, 166.

CONDONATION—*continued*.

2. Is a question of fact to be decided by a jury if the issues on a petition are so directed to be tried.—*Peacock v. Peacock*, 184.
3. Of cruelty, will not be pressed against the wife where a probable motive of continuing cohabitation is the fear of being deprived of her children, and of leaving them in the sole control of a harsh and excitable father.—*Curtis v. Curtis*, 192.

Where certain acts of violence have been condoned by continued cohabitation, it has been held that harsh and degrading treatment short of personal violence or threats exciting reasonable apprehension would revive the former acts.—*Ibid.*, 207; *Bostock v. Bostock*, 221.

4. Condonation not pleaded but clearly established in evidence would be noticed by the Court.—*Curtis v. Curtis*, 199. But in that case the Court would also admit evidence of subsequent acts of cruelty.—*Suggate v. Suggate*, 949.
5. Condonation means a blotting out of the offence imputed, so as to restore the offending party to the same position he or she occupied before the offence was committed; forgiveness, in ordinary language, is not an equivalent term.—*Keats v. Keats and Montezuma*, 345.

To what extent knowledge of the whole guilt is a condition precedent of condonation.—*Ibid.*, 346.

Continued cohabitation after knowledge of adultery not taken so strictly against the wife or against the husband.—*Ibid.*, 347.

Quære, whether condonation can be constituted by words?—*Ibid.*, 347.
Semble, not without the resumption or continuance of conjugal cohabitation.—*Ibid.*, 356.

6. The adultery of one spouse having been condoned, is no bar to a suit founded on the subsequent adultery of the other spouse.—*Seller v. Seller*, 482.
7. By the husband of an act of adultery by the wife no bar to his suit for dissolution by reason of the wife's subsequent adultery.—*Wilton v. Wilton and Chamberlain*, 563.

CONJUGAL RIGHTS.

1. Insanity of the wife no answer on the part of the husband to her suit for restitution of conjugal rights.—*Hayward v. Hayward*, 81.
2. A wife whose adultery, as well as that of her husband, has been proved cannot maintain a suit for restitution of conjugal rights.—*Hope v. Hope*, 94.

CONNIVANCE.

In a deed of separation it was expressed that "Mrs. S. promises that, if she "does not fulfil her part of the agreement, Major S. shall have the full "power of a husband over her, whatever his way of living may be." The wife petitioned for judicial separation by reason of the husband's subsequent adultery and previous adultery unknown to her at the date of the deed of separation. The husband pleaded connivance and relied on the agreement, but there was no evidence that the wife was then cognisant of his adultery, and the Court held that as an innocent meaning could be given to the above clause of the agreement, it would not suppose an immoral contract.—*Studdy v. Studdy*, 321.

CO-RESPONDENT. See COLLUSION. DAMAGES.

1. To the husband's petition on the grounds of the wife's adultery, the alleged adulterer must be made a co-respondent, unless special reasons are shown to the Court for omitting to do so.—*Ex parte Armitage*, 71.
2. Where the husband had obtained a sentence of divorce *à mensâ et thoro*, and recovered £1,000 damages and costs in an undefended action for crim. con., and the alleged adulterer was at the time of petition on foreign service, the Court allowed the petitioner to proceed without making a co-respondent.—*Tomkin v. Tomkin and Another*, 182.

Where the wife is living in a brothel, the husband has been allowed to proceed without making a co-respondent.—*Hook v. Hook*, 183.

3. Cannot be heard at the trial unless he has put in an answer to the petition.—*Norris v. Norris and Gyles*, 174; *Tourle v. Tourle and Renshaw*, 176. Except as to costs under Rule 15, January, 1860.
4. Is generally liable in costs where the husband succeeds in his petition.—*Evans v. Evans and Robinson*, 328.

But where the husband had obtained a divorce *à mensâ et thoro*, and damages and costs in an action for crim. con., and the petition for dissolution was not defended, the Court refused to make any order for costs.—*Ling v. Ling and Croker*, 187.

5. If the petitioner asks for costs against the co-respondent, evidence should be given that the co-respondent was aware that he was intriguing with a married woman, and of the circumstances under which the cohabitation of husband and wife ceased.—*Teagle v. Teagle and Nottingham*, 188; *Boyd v. Boyd and Collins*, 562; *Wilton v. Wilton and Chamberlain*, 564.

But if the co-respondent well knew that the respondent was a married woman, some remissness of the husband toward the wife will not disentitle him to costs.—*Badcock v. Badcock and Chamberlain*, 109.

6. Where an arrangement had been entered into between the husband and the adulterer to send the wife home to live under her mother's protection, part of such arrangement being that the husband should bear his own costs if he proceeded for a divorce, the Court condemned the co-respondent in the whole costs on the ground that he had not fully carried out the arrangement on his side.—*Ratcliff v. Ratcliff and Anderson*, 467.
7. The co-respondent is party to a suit instituted in consequence of adultery (14 & 15 Vict. c. 99, s. 4), and is inadmissible as a witness.—*Robinson v. Robinson and Lane*, 382.

But if there is no sufficient evidence against the co-respondent, the Court may dismiss him from the suit (21 & 22 Vict. c. 108, s. 11), whereby he becomes a competent witness.—*Ibid.*, 388.

8. Is liable to be sued by the husband for damages, which must be assessed by the verdict of a jury (20 & 21 Vict. c. 85, s. 33), and the Court has power to direct the application of the sum so assessed.—*Keats v. Keats and Montezuma*, 359; *Bell v. Bell and Anglescy*, 565.

COSTS. See CO-RESPONDENT, 4 and 5.

1. The wife's costs on the husband's petition for dissolution may be taxed against the husband from time to time.—*Weber v. Weber and Pync*, 219.
And security will be taken or a sum of money ordered to be paid

COSTS—*continued*.

into Court to meet the wife's probable costs of the hearing, out of which her proctor will be entitled to taxed costs, whatever may be the result of the hearing.—*Evans v. Evans and Robinson*, 330.

But if the taxation or order for payment into Court is not obtained before the hearing, the husband will not be liable where the wife's defence fails.—*Keats v. Keats and Montezuma*, 358.

2. The wife's proctor is entitled, if application is made in due time, to have her costs taxed against the husband, and would incur a grave responsibility by refusing to bring before the Court any defence set up by his client not plainly unfounded.—*Wells v. Wells*, 308.
3. In a suit by the wife for judicial separation, the husband being a bricklayer at weekly wages, the Court ordered the wife's costs to be taxed and a sum of money to be deposited to meet the costs of the hearing, but intimated its unwillingness to grant an attachment if the husband were shown to be unable to pay.—*Ward v. Ward*, 484.
4. The wife's costs refused on dismissal of the husband's petition against her, the circumstances of the case being very peculiar, and the wife having some independent income.—*Robinson v. Robinson*, 400.
5. The general principle of taxing costs against a husband are the same as in other causes. The rule of the Ecclesiastical Court not to allow more than two counsel on taxation is not applicable where oral evidence is taken in open Court. Where a London attorney conducts the suit no expenses of a local attorney will be allowed in taxation against the husband.—*Suggate v. Suggate*, 497.
6. B. obtained a sentence of divorce, by reason of his wife's adultery, in the Court of Session in Scotland in 1841; in 1858 he petitioned for dissolution in this Court, which pronounced a decree of dissolution and refused to make any order for the wife's costs.—*Tollemache v. Tollemache*, 557.

COURT. See DISCRETION. JURISDICTION.

Has no power to hear any case otherwise than in open Court.—*H— v. C—*, 605.

Has power to call and examine any witnesses to explain or substantiate suspicions it may entertain, and such witnesses may be cross-examined by the petitioner.—*Lloyd v. Lloyd and Chichester*, 570.

CRUELTY. See CONDONATION, 2, 3.

1. Where the question of cruelty comes before a jury they are to find not only whether the acts complained of were done, but whether they constitute legal cruelty.—*Tomkins v. Tomkins*, 168.
2. Injury to person or to health, or reasonable apprehension of bodily hurt, is the general description of legal cruelty.—*Ibid.*, 171.
3. Harsh and degrading treatment of a wife by a husband, short of personal violence, may cause a reasonable apprehension of further violence, and revive former acts of cruelty condoned.—*Curtis v. Curtis*, 192.
In like manner threats, if of such a nature as to satisfy the Court that further cohabitation would be attended with danger.—*Bostock v. Bostock*, 224.
4. Whatever may be the cause or motive of the husband's violence, the wife is entitled to the protection of the Court if cohabitation is rendered

CRUELTY—*continued*.

unsafe, unless she herself is greatly to blame.—*Curtis v. Curtis*, 213; *Marsh v. Marsh*, 312.

5. Where the wife had reasonable grounds for suspicion of undue familiarity between the husband and a maidservant, the Court took into consideration the condition in which the wife was placed in the family by reason of authority or control over her by the servants by the direction of the husband.—*Anthony v. Anthony*, 594.
6. The drunkenness of the wife will not justify any greater degree of violence on the part of the husband than may be necessary to control the wife's violence.—*Pearman v. Pearman and Burgess*, 601.
7. Lapse of time between the acts of cruelty alleged and the remedy sought, joined with other circumstances, *e. g.* a deed of separation, may lead the Court to conclude that the application is made not for the protection of the petitioner's person, but for some collateral purposes, in which case the petition will be dismissed.—*Matthews v. Matthews*, 499.
8. The husband will be entitled to the protection of the Court where the wife's passions, from whatever cause, are so little under control that she is in the habit of using personal violence toward her husband.—*White v. White*, 591.
9. As cruelty is in ordinary language an ambiguous term, a petition should state shortly the kind of acts relied upon.—*Suggate v. Suggate*, 490.
10. Cruelty to children in the presence of the mother has been held cruelty to the mother.—*Ibid.*, 491.
11. Where the respondent's adultery is proved, and the cruelty of the petitioner, the Court is not bound to pronounce a decree of dissolution; but where the jury found the petitioner to have been guilty of cruelty towards his wife, the Court, considering that his violence was probably caused by her drunken habits, decreed the dissolution.—*Pearman v. Pearman and Burgess*, 600.

DAMAGES.

1. Where the jury gave £1,000 damages, the Court directed that sum to be applied,—1st, to the payment of the respondent's costs; 2nd, to the payment of the petitioner's, and the surplus, if any, towards an annuity directed to be paid to the respondent.—*Keats v. Keats and Monteruma*, 359.
2. *Seemle*, the pecuniary position of the husband in respect of moneys settled upon the wife may be submitted to the jury for their consideration in the assessment of damages.—*Bell v. Bell and Anglesey*, 565.

DELAY. See CRUELTY, 7. NULLITY OF MARRIAGE, 1.

Where adultery is proved, if the Court should think that there has been unreasonable delay in presenting or prosecuting a petition, it is not bound to decree dissolution; where the adultery charged took place in 1850, the petitioner being then a captain in H. M. 22nd regiment, and from the circumstances connected with the transaction subsequently sold out, the Court held there was no unreasonable delay, though no step was taken before the establishment of the present tribunal.—*Ratcliff v. Ratcliff and Anderson*, 473.

The delay to prejudice of the petitioner must have been such as

DELAY—*continued.*

under the circumstances of the case to show him insensible to the loss sustained.—*Pellew v. Pellew and Berkeley*, 553.

It must be culpable, something in the nature of connivance or acquiescence.—*Tollemache v. Tollemache*, 561.

DESERTION. *See* PROTECTION OF WIFE'S PROPERTY. SEPARATION.

1. Desertion without cause for two years and upwards, either as a ground for judicial separation, or jointly with adultery, for dissolution of marriage, must have taken place without the consent of the spouse who relies upon it.—*Ward v. Ward*, 185; *Thompson v. Thompson*, 231; *Smith v. Smith*, 359.

2. Is not constituted by the husband's absence to seek employment.—*Thompson v. Thompson*, 231.

But where the husband refused to return to what had been the home of the parties, and made no offer of a new home, the Court held that desertion was established.—*Cudlipp v. Cudlipp*, 229.

3. When the right of the wife to relief by reason of desertion has once accrued, no subsequent offer (*i. e.* since 11th January, 1858) of the husband to return can bar her right.—*Cargill v. Cargill*, 236.

But where the desertion and an offer to return, which was refused, by the wife, took place before the 11th January, 1858, the Court dismissed the petition.—*Brookes v. Brookes*, 326.

4. Desertion must be distinctly averred when it is intended to be relied on as the ground of the petition.—*Pyne v. Pyne*, 80.

DISCRETION. *See* CHILD, 1. COLLUSION. CRUELTY. DELAY. SEPARATION.

Of the Court as to pronouncing its decree of dissolution where adultery proved, 20 & 21 Vict. c. 85, s. 31.

1. Where the petitioner has proved his or her petition, a case for the discretion of the Court does not arise unless there is affirmative evidence that the petitioner deserted, wilfully separated from, or neglected, etc., the other party to the marriage.—*Haswell v. Haswell and Sanderson*, 502.

2. But if the evidence in support of the petition excites suspicion in the mind of the Court, it may examine the petitioner, and the petitioner's counsel may suggest any question to explain any matter apparently adverse that has been elicited by the examination of the Court.—*Ibid.*

3. The neglect or misconduct conducing to adultery means neglect or misconduct towards the other spouse on the part of the petitioner, and not the consequences of neglect or misconduct in other capacities, though such consequences may have conduced to the adultery.—*Cunnington v. Cunningham and Noble*, 475.

DOMICIL. *See* JURISDICTION.

1. Of the husband is the domicile of the wife, and such misconduct on his part as would furnish her with a defence to a suit for restitution would not enable her to acquire a domicile for herself.—*Yelverton v. Yelverton*, 584.

2. The word domicile has various meanings, and for some purposes the domicile of origin may be retained, and yet a sufficient English domicile acquired to found the jurisdiction of the Court.—*Ibid.*, 585.

DOMICIL—*continued.*

3. A foreigner does not acquire an English domicile by enlisting in a regiment in her Majesty's service, the head-quarters of which are in England.—*Yelverton v. Yelverton*, 585.

EVIDENCE. *See* ADMISSION. CO-RESPONDENT, 7.

1. Where the wife petitions for dissolution by reason of adultery and desertion, she is party to a proceeding instituted in consequence of adultery, and so excluded, by 14 & 15 Vict. c. 99. s. 4, from giving evidence of desertion.—*Pyne v. Pyne*, 178; but see 22 & 23 Vict. c. 61, s. 6.
2. Where there was evidence of condonation to go to the jury, and counsel for the petitioner tendered evidence of acts of adultery subsequent to the date of the alleged condonation, and not charged in the petition, the Court, *hesitantly*, rejected such evidence.—*Keats v. Keats and Montezuma*, 344.

HUSBAND. *See* CHILD. COSTS. CONJUGAL RIGHTS. CO-RESPONDENT. CRUELTY, 8. DAMAGES. DELAY. SEPARATION.JURISDICTION. *See* DOMICIL.

1. Of the Court to entertain a petition for dissolution not barred by the dismissal of a suit by the Court of Arches for divorce *à mensâ et thoro*, on the same charges of adultery.—*Evans v. Evans and Robinson*, 173.
2. The jurisdiction of the Court is founded where the domicile of the parties is English, though the marriage and adultery may have taken place abroad.—*Ratcliff v. Ratcliff and Anderson*, 467.
3. Where in a suit for restitution the respondent appeared under protest to the jurisdiction, and it appeared that his domicile of origin was Irish, and that he had never acquired a domicile in England, the Court sustained the protest and dismissed the petition.—*Yelverton v. Yelverton*, 573.
4. Of the Ecclesiastical Courts in matrimonial matters considered.—*Ibid.*
On the question of the jurisdiction of the Court, Ireland and Scotland are foreign countries.—*Ibid.*
5. The Court has no jurisdiction to allow a third person having no legal private interest to intervene in a suit for dissolution, on the suggestion that the petitioner is herself guilty of adultery.—*Y— v. Y—*, 598.
6. A Scotch Court has no jurisdiction to put an end to the marriage-bond of a domiciled Englishman.—*Tollemache v. Tollemache*, 561.
7. Where a decree for costs in a matrimonial suit in the Chancery Court of York was still outstanding, the Court directed the cause to be entered on its books as soon as the papers should be transferred to its registry.—*Leigh v. Leigh*, 164.

MARRIAGE. *See* SETTLEMENT.

1. Of parties to a suit need not be proved on trial by a jury if not one of the issues stated in the record for the jury.—*Tourle v. Tourle and Renshaw*, 176.
But must be proved before the Court will make a decree of dissolution.—*Evans v. Evans and Robinson*, 328.

MARRIAGE—*continued*.

2. Marriage of a domiciled Englishman not dissolved by the sentence of a Scotch Court.—*Tollemache v. Tollemache*, 561.

NULLITY OF MARRIAGE.

1. Petition for decree of nullity by reason of the man's impotence dismissed, lapse of time and other circumstances of the case inducing the majority of the Court to be of opinion that the petition was brought for collateral purposes, and not founded on the grievance complained of.—*H.— (falsely called C.—) v. C.—*, 605.
2. There is no sufficient authority in the annals of the Ecclesiastical Courts for pronouncing a decree of nullity without a monition on the respondent to submit to personal inspection having at least been extracted.—*Ibid*.

PETITIONER. *See* AGREEMENT. AFFIDAVIT, 1, 2. COLLUSION. CONNIVANCE. EVIDENCE. CO-RESPONDENT, 1, 2, 4, 5, 8.

1. Cannot be examined to prove his or her own case when the question of adultery is involved.—*Pyne v. Pyne*, 178. Except the wife on her petition for dissolution as to cruelty or desertion: see 22 & 23 Vic. c. 61, s. 6.
2. May be examined by the Court or by the other party to the suit, under 43 sect. of 20 & 21 Vict. c. 85.—*Haswell v. Haswell and Sanderson*, 502.
3. Must show practical impossibility of serving citation on the respondent before the Court will allow to proceed without service.—*Rowbotham v. Rowbotham*, 73; *Peckover v. Peckover and Jolly*, 219.

PLEADING AND PRACTICE. *See* AFFIDAVIT. AGREEMENT. ALIMONY, 7. AMENDMENT. CHILD, 4, 5. CONDONATION, 1, 2, 4. CO-RESPONDENT, 7, 8. COSTS. COURT. CRUELTY, 1, 9, 10. DAMAGES. DESERTION, 4. DISCRETION, 2. EVIDENCE. MARRIAGE, 1. NULLITY OF MARRIAGE, 2. PETITIONER. RESPONDENT.

PROTECTION OF WIFE'S PROPERTY.

1. The order for, under 21 sect. of 20 & 21 Vict. c. 85, cannot specify the particular property to be protected, but is in general terms as to all property acquired since a certain date.—*Ex parte Mullineux*, 77.
2. Desertion for this purpose would be put an end to by a *bonâ fide* return to cohabitation at any period, and the doctrine of revival is inapplicable.—*Ex parte Aldridge*, 89; *Cargill v. Cargill*, 236.

RESPONDENT. *See* ADMISSION. AFFIDAVIT, 3.

Where certain of the facts of the petition remained undisputed on the record, the Court held that the respondent had no right to contest those facts, or to cross-examine the petitioner's witnesses thereto, but, *rebus sic stantibus*, might examine the petitioner, and argue against the propriety of the prayer of the petition.—*Tollemache v. Tollemache*, 559.

SEPARATION. *See* DISCRETION OF COURT.

1. Where a girl of sixteen left her mother's house, and was married to a teacher of French in 1853, without the knowledge or consent of her friends, who on her return the same morning sent her abroad, the Court

SEPARATION—*continued.*

held, on her subsequent petition for dissolution, that there was a reasonable excuse for the separation.—*Du Terreaux v. Du Terreaux*, 555.

2. Where the husband found his wife submitting to indecent familiarities and separated himself from her, the Court held that there was reasonable excuse.—*Haswell v. Haswell and Sanderson*, 502.

3. Where the husband, after an act of adultery by the wife, received her back, and then went himself to Australia to see what prospect there might be of settling there, leaving his wife for the time in a residence close to her own mother, and she again committed adultery, the Court held that the husband's absence was warranted.—*Wilton v. Wilton and Chamberlain*, 563.

SETTLEMENTS. *See* DAMAGES, 2.

Ante or *post* nuptial; *quare*, whether the Court has power to deal with, under 22 & 23 Vict. c. 61, s. 5, unless there be children of the marriage.—*Bell v. Bell and Anglesey*, 565.

WIFE. *See* ALIMONY. CHILD. COSTS. CONJUGAL RIGHTS. CRUELTY. DELAY. DESERTION. PROTECTION OF PROPERTY. SEPARATION, 1.

END OF VOL. I.



